Handling Cases Involving Self-Represented Litigants

A BENCHGUIDE FOR JUDICIAL OFFICERS

JANUARY 2007

A Benchguide for Judicial Officers

January 2007

ADMINISTRATIVE OFFICE OF THE COURTS

CENTER FOR FAMILIES, CHILDREN & THE COURTS

Judicial Council of California
Administrative Office of the Courts
Center for Families, Children & the Courts
455 Golden Gate Avenue
San Francisco, CA 94102-3688

This publication was made possible by a grant from the State Justice Institute (SJI-05-N-002), with supplemental funding from the Foundation of the State Bar of California. Points of view expressed herein do not necessarily represent the official positions or policies of the Judicial Council of California, the California Administrative Office of the Courts, the State Justice Institute, or the Foundation of the State Bar of California.

Printed on 100% recycled and recyclable paper.

Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

CHIEF JUSTICE RONALD M. GEORGE
Chair, Judicial Council

WILLIAM C. VICKREY
Administrative Director of the Courts

RONALD G. OVERHOLT
Chief Deputy

CENTER FOR FAMILIES, CHILDREN & THE COURTS
PROJECT STAFF:

DIANE NUNN
Director

CHARLENE E. DEPNER
Assistant Director

LEE MORHAR
Assistant Director

BONNIE ROSE HOUGH
Supervising Attorney

DEBORAH CHASE
Senior Attorney

JOSEPH NGUYEN
Administrative Coordinator

JOHN GREACEN
Consultant

KATHLEEN SIKORA
Consultant

KELLY TAIT
Consultant

RICHARD ZORZA
Consultant

Members of the Task Force on Self-Represented Litigants

HON. KATHLEEN E. O'LEARY, CHAIR
Associate Justice of the Court of Appeal, Fourth Appellate District, Division Three

MR. ALBERT Y. BALINGIT
Attorney, Department of Consumer Affairs, Legal Services Unit

HON. VINCENT J. CHIARELLO
Judge of the Superior Court of California, County of Santa Clara

MR. NEAL DUDOVITZ
Executive Director, Neighborhood Legal Services of Los Angeles County

HON. ANDREW GUILFORD
United States District Judge, Santa Ana

HON. DONNA J. HITCHENS
Judge of the Superior Court of California, County of San Francisco

MS. MARILYN K. JAMES
Director, Evaluation and Planning, Superior Court Of California, County of San Diego

HON. SUZANNE KINGSBURY
Presiding Judge of the Superior Court of California, County of El Dorado

HON. MICHELE D. LEVINE
Judge of the Superior Court of California, County of Riverside

MS. SUZANNE CLARK MORLOCK
Attorney at Law, Chico

MS. TINA L. RASNOW
Director, Self-Help Legal Access Center, Superior Court of California, County of Ventura

MS. SHAROL STRICKLAND
Executive Officer, Superior Court of California, County of Butte

HON. ERICA YEW
Judge of the Superior Court of California, County of Santa Clara

HON. LAURIE ZELON
Associate Justice of the Court of Appeal, Second Appellate District, Division Seven

MR. JOHN ZORBAS
Director, Butte County Law Library

ADMINISTRATIVE OFFICE OF THE COURTS

PROJECT STAFF
MS. BONNIE ROSE HOUGH, Supervising Attorney
Center for Families, Children & the Courts

DR. DEBORAH J. CHASE, Senior Attorney
Center for Families, Children & the Courts

MR. HARRY JACOBS, Senior Attorney
Center for Families, Children & the Courts

MR. KEVIN CHEW, Administrative Coordinator
Center for Families, Children & the Courts

MS. TRACY KENNY, Legislative Advocate
Office of Government Affairs

MR. JOSEPH NGUYEN, Administrative Coordinator, Center for Families, Children & the Courts

LIAISONS

JUDICIAL COUNCIL
MR. ANTHONY CAPOZZI
Law Offices of Anthony Capozzi
Fresno, California

PRESIDING JUDGES ADVISORY COMMITTEE
HON. JOHN R. SMILEY
Presiding Judge of the Superior Court of California, County of Ventura

COURT EXECUTIVES ADVISORY COMMITTEE
MS. LISA GALDOS
Executive Officer of the Superior Court of California, County of Monterey

STATE BAR OF CALIFORNIA
MS. MARY LAVERY FLYNN
Director, Legal Services Outreach
State Bar of California

CJER GOVERNING COMMITTEE
HON. CAROLYN B. KUHL
Judge of the Superior Court of California, County of Los Angeles

Table of Contents

Acknowledgments

This benchguide was developed under grant #SJI-05-N-002 from the State Justice Institute. The viewpoints expressed here do not necessarily represent the official position or policies of the State Justice Institute.

The California Administrative Office of the Courts gratefully acknowledges the contributions of the following persons to this publication.

Ms. Tamara Abrams, Administrative Office of the Courts
Hon. William H. Abraskin, Springfield Housing Court, Springfield, Massachusetts
Hon. Verna Adams, Superior Court of California, County of Marin
Hon. Rebecca Albrecht (Ret.), Maricopa County Superior Court, Phoenix, Arizona
Hon. Sue Alexander, Superior Court of California, County of Alameda
Ms. Karene Alvarado, Administrative Office of the Courts
Ms. Heather Anderson, Administrative Office of the Courts
Hon. William Appel, Superior Court of California, County of Alameda
Ms. Melissa Ardaiz, Administrative Office of the Courts
Hon. Don Ash, Sixteenth Judicial District, Tennessee
Hon. Steve Austin, Superior Court of California, County of Contra Costa
Mr. Albert Y. Balingit, State of California, Department of Consumer Affairs
Hon. Raima Ballinger, Superior Court of California, County of Sonoma
Hon. Louise Bayles-Fightmaster, Superior Court of California, County of Sonoma
Hon. Lois Bloom, Eastern District of New York
Hon. Aviva Bobb, Superior Court of California, County of Los Angeles
Hon. Jerilyn Borack, Superior Court of California, County of Sacramento
Ms. Diane Bras, Superior Court of California, County of Placer
Ms. Julie Bronson, Superior Court of California, County of Los Angeles
Hon. Bob Broughton, Superior Court of California, County of Contra Costa

Ms. Maeve Elise Brown, National Housing Law Project, Oakland, California
Hon. Charles Campbell, Jr., Superior Court of California, County of Ventura
Mr. Anthony Capozzi, Law Offices of Anthony Capozzi, Fresno, California
Hon. Norma Castellanos-Perez, Superior Court of California, County of Tulare
Mr. Rod Cathcart, Administrative Office of the Courts
Ms. Tiela Chalmers, Volunteer Legal Services Program of the Bar Association of San Francisco
Dr. Deborah Chase, Administrative Office of the Courts
Hon. Vincent J. Chiarello, Superior Court of California, County of Santa Clara
Hon. Rene Chouteau, Superior Court of California, County of Sonoma
Hon. Nancy Cisneros, Superior Court of California, County of Fresno
Ms. Donna Clay-Conti, Administrative Office of the Courts
Ms. Nanci Clinch, Attorney at Law, County of Placer
Hon. Jacqueline Connor, Superior Court of California, County of Los Angeles
Ms. Emberly Cross, Cooperative Restraining Order Clinic, San Francisco, California
Hon. Amy Davenport, Vermont Trial Court
Ms. Sherna Deamer, Superior Court of California, County of Contra Costa
Ms. Charlene Depner, Administrative Office of the Courts
Hon. Sean Dowling, Superior Court of California, County of Nevada
Mr. Neal Dudovitz, Neighborhood Legal Services of Los Angeles County
Hon. Lynn Duryee, Superior Court of California, County of Marin
Hon. Sherrill Ellsworth, Superior Court of California, County of Riverside
Hon. Russell Fagg, Montana District Court
Hon. Fern Fisher, New York City Civil (Housing Court)
Ms. Mary Lavery Flynn, State Bar of California
Mr. David Foster, Administrative Office of the Courts
Ms. Lisa Galdos, Superior Court of California, County of Monterey
Ms. Theresa Gary, Superior Court of California, County of Kern
Hon. Margery German, Suffolk Juvenile Court, Massachusetts
Ms. Alissa Glasser, Administrative Office of the Courts
Ms. Cynthia Gray, American Judicature Society,Illinois
Hon. Karla M. Gray, Chief Justice, Montana Supreme Court
Mr. John Greacen, Greacen Associates, LLC, New Mexico

Hon. Mary Ann Grilli, Superior Court of California, County of Santa Clara
Hon. Andrew Guilford, U.S. District Court, Central District of California
Hon. David Haet, Superior Court of California, County of Solano
Ms. Paula Hanford-Agor, National Center for State Courts, Virginia
Ms. Frances Harrison, Superior Court of California, County of San Diego
Ms. Sarah Heckman, Superior Court of California, County of Sutter
Hon. Donna J. Hitchens, Superior Court of California, County of San Francisco
Hon. Peggy Hora (Ret.), Superior Court of California, County of Alameda
Ms. Bonnie Rose Hough, Administrative Office of the Courts
Ms. Cecelia Isaac, Superior Court of California, County of Ventura
Mr. Harry Jacobs, Administrative Office of the Courts
Ms. Marilyn James, Superior Court of California, County of San Diego
Ms. Beth Jay, Attorney, California Supreme Court
Hon. Constance Jimenez, Superior Court of California, County of Santa Clara
Hon. Mark Juhas, Superior Court of California, County of Los Angeles
Ms. Sharon Kalemkiarian, Attorney at Law, San Diego
Ms. Jane Kaplan, Attorney at Law, County of Alameda
Hon. Frances A. Kearney, Superior Court of California, County of Placer
Ms. Carla Khal, Superior Court of California, County of Tulare
Hon. Suzanne N. Kingsbury, Superior Court of California, County of El Dorado
Ms. Heidi Kolbe, Facilitator, Sacramento
Hon. Judith Kreeger, Eleventh Judicial Circuit for Miami-Dade, Florida
Hon. Carolyn B. Kuhl, Superior Court of California, County of Los Angeles
Hon. James Lambden, First Appellate District, Division Two, San Francisco
Ms. Evy Leiveige, Superior Court of California, County of Alameda
Hon. Michele D. Levine, Superior Court of California, County of Riverside
Ms. Cristina Llop, Attorney at Law, San Francisco
Mr. Bob Lowney, Administrative Office of the Courts
Hon. Edward Lynch, District Court for First Judicial District of Minnesota

Hon. Catherine Lyons, Superior Court of California, County of San Francisco
Hon. Daniel Mably, 4th Hennepin District Court, Minnesota
Mr. Larry Maloney, Superior Court of California, County of Riverside
Hon. Ruben Martino, Harlem Community Court
Hon. Laura Masunaga, Superior Court of California, County of Siskiyou
Mr. James Mensing, Administrative Office of the Courts
Ms. Debra Meyers, Superior Court of California, County of San Bernardino
Ms. Kim Milligan, Attorney at Law, Nevada City
Hon. James Mize, Superior Court of California, County of Sacramento
Mr. Lee Morhar, Administrative Office of the Courts
Hon. Elaine Moriarty, Suffolk Probate and Family Court, Boston
Ms. Suzanne Clark Morlock, Self–Help Assistance and Referral Program (SHARP), Superior Court of California, Counties of Butte, Glenn and Tehama
Hon. Heather Morse, Superior Court of California, County of Santa Cruz
Dr. Lynn O'Connor, Professor, the Wright Institute, Associate Clinical Professor, University of California, Berkeley
Hon. Kathleen O'Leary, Fourth Appellate District, Division Three, Santa Ana
Hon. Donna Petre, Superior Court of California, County of Yolo
Ms. Tina Rasnow, Superior Court of California, County of Ventura
Hon. Janice Redding, 4th Hennepin District Court, Minnesota
Mr. Michael Roosevelt, Administrative Office of the Courts
Hon. Arnold Rosenfield, Superior Court of California, County of Sonoma
Hon. Robert A. Schnider, Superior Court of California, County of Los Angeles
Ms. Gretchen Serrata, Superior Court of California, County of Nevada
Ms. Kathleen Sikora, Attorney at Law, Berkeley, California
Hon. John R. Smiley, Superior Court of California, County of Ventura
Hon. Nancy Wieben Stock, Superior Court of California, County of Orange
Ms. Sharol Strickland, Superior Court of California, County of Butte
Hon. Thomas L. Surh, Superior Court of California, County of Alameda
Ms. Kelly Tait, Kelly Tait Consulting, Reno, Nevada
Ms. M. Sue Talia, Attorney at Law, Walnut Creek, California
Mr. Alan Weiner, Administrative Office of the Courts

Ms. Bobbie Welling, Administrative Office of the Courts
Hon. Dale Wells, Superior Court of California, County of Riverside
Hon. Kathleen M. White, Superior Court of California, County of Yolo
Ms. Suzanne Whitlock, Superior Court of California, County of Stanislaus
Hon. Cerena Wong, Superior Court of California, County of Sonoma
Hon. Patricia Wong, Superior Court of California, County of Sacramento
Hon. Erica Yew, Superior Court of California, County of Santa Clara
Hon. Laurie Zelon, Second Appellate District, Division Seven, Los Angeles
Mr. John A. Zorbas, Butte County Law Library, Oroville, California
Mr. Richard Zorza, Zorza Associates, Washington, D.C.

Special thanks to California small claims legal advisors, family law facilitators, family law judicial officers, court clerks, and self-help center directors who responded to our surveys about working with self-represented litigants and who participated in focus groups and interviews to provide guidance. Many thanks to the judges and their staff who let us observe their courtrooms and interview litigants after their hearings, and to the many self-represented litigants who shared their experiences.

The viewpoints expressed here do not necessarily represent the position of the contributors to this benchguide.

Overview

One of the most significant changes in the court system in recent years is the growing number of self-represented litigants. Most judges now spend a significant portion of their judicial career handling cases in which at least one party is self-represented.

This change offers both opportunities and challenges for trial judges, highlighting the crucial role that they play in making sure that the self-represented obtain access to justice.

Many judges report that they like handling cases with self-represented litigants because these litigants do not generally engage in legal gamesmanship. These judges find it easier to get quickly to the crux of a matter and to craft creative problem-solving orders for litigants.

However, self-represented litigants often have difficulty preparing complete pleadings, meeting procedural requirements, and articulating their cases clearly to the judicial officer. These difficulties produce obvious challenges.

Many innovative solutions exist to help litigants draft adequate pleadings and prepare for hearings. Yet these solutions cannot completely substitute for the three years of law school and the experience that lawyers bring to the courtroom. Until recently, there has been little guidance for judges on how to meet the challenges of ensuring access to justice while running an efficient calendar that includes such cases.

This benchguide is designed to help judicial officers handle the growing self-represented litigant portion of their caseload. Based on the experiences of hundreds of judicial officers who have shared their perspectives, ideas, and suggestions, this guide includes tools and techniques to help judges run their courtrooms effectively, comply with the law, maintain neutrality, and increase access to justice.

The benchguide starts with a general discussion of the characteristics and needs of the self-represented and offers guidance on how to handle cases with self-represented litigants, including a review of the case law on this issue. It discusses caseflow and calendar management

and provides scripts and suggestions on managing a courtroom with self-represented litigants to ensure that it runs smoothly.

Because self-represented litigants do not have attorneys to interpret the "foreign" language of the courtroom, to explain the process, and to screen for and remedy problems that may occur, judges are faced with special challenges. This benchguide therefore provides specific information and tools on enhancing communication skills and on recognizing and dealing with potential unintended bias.

Historically, limited resources have been allocated to family, small claims, misdemeanor and traffic, and eviction cases, resulting in high-volume dockets that create heavy workloads for judges and that allow little time for litigants to present their cases. When judges feel that they have insufficient time to listen and get the facts they need to make a decision, their job becomes more stressful. The guide provides suggestions for ways to get help to make such assignments more manageable and concludes by discussing the crucial role of judicial leadership in building the innovations that enhance access to justice.

The guide is intended to provide a framework for analyzing the ethical, legal, and practical issues that judges face in handling a courtroom with self-represented litigants. It assumes that judges are most effective when they develop a style that works with their personality—but encourages them to reflect on that style and shares ideas that other jurists have found helpful. Many judges report that incorporating these techniques makes them more effective jurists in all cases, including those in which lawyers participate.

The benchguide is designed to help judicial officers in all parts of their career—from the first day on the bench to veteran status—to think through these issues and find ways to make handling cases involving self-represented litigants a rewarding part of their judicial career.

This is a rapidly evolving area of law and practice. This benchguide will therefore be updated and modified over time. Judges are encouraged to send suggestions, ideas, questions, and comments to equalaccess@jud.ca.gov.

Chapter 1: Self-Represented Litigants: Who Are They and What Do They Face When They Come To Court?

1

Self-Represented Litigants: Who Are They and What Do They Face When They Come to Court?

Introduction

Many judges have expectations about who self-represented litigants are, why they do not have lawyers, what they want from the court, and how they will behave. These expectations play a powerful role in how the courts treat people who are representing themselves.

While many of these expectations come from experience, some may result from particularly dramatic or intense cases and may not reflect the complex reality of the millions who represent themselves in court each year.

Statistical surveys and court self-help centers have been critical for understanding this reality and for improving our response to the needs of such litigants.

This chapter provides background for judges on the issues set out in this benchguide.

I. Why Do Litigants Represent Themselves?

Most self-represented litigants in civil cases give the following answers when asked why they do not have a lawyer:[1]

1. "I can't afford a lawyer"; or

2. "My case is simple enough to handle on my own."

These reasons for not having a lawyer reflect economic and social trends and are not likely to change in the near future.

More than 90 percent of the 450,000 people each year who use self-help programs in California earn less than $2,000 per month. The majority are working and raising families. Given the high price of hiring a lawyer, even individuals with large incomes are likely to find the cost of counsel represents a substantial burden that can have long-term impacts on family financial stability.

Through 2012, the largest number of job openings will be in primarily low-wage occupations, such as retail salespersons, food preparation and service workers, and cashiers. In fact, 5 of the top 10 occupations expected to add the most jobs during this period pay a median hourly wage of less than $10, equivalent to an annual salary of $20,800 for full-time, year-round work. The result will be more, rather than fewer, self-represented litigants.

Legal services programs are unable to meet the need for representation. The State Bar reports that the ratio of poor people to

[1] Little systematic data is available for litigants who represent themselves in criminal court. Anecdotal information suggests that as many as 40 percent of misdemeanor defendants represent themselves in California—often to enter a plea. This is likely to vary depending on the availability of public defender services, and many of the suggestions in this guide will pertain to that group. However, the issues of felony or even misdemeanor cases where litigants are generally choosing to represent themselves, rather than have a public defender, are beyond the scope of this benchguide. While they represent a significant concern for judicial officers, they are a relatively small proportion of the millions of self-represented litigants. For additional assistance with these difficult cases, judicial officers are encouraged to review *CJER Benchguide 54: Right to Counsel Issues*; materials regarding *Pro Per Problems and Difficult Defendants* (May 2004), by Judge Jacqueline A. Conner of the Los Angeles Superior Court; and the "Pro Per Courtroom" chapter of *Developing Effective Practices in Criminal Caseflow Management* (J. Greacen, 2004), a manual prepared for the Administrative Office of the Courts.

legal aid attorneys in California is 10,000 to 1. Legal needs studies indicate that legal services programs are able to serve only 20 percent of the people needing help.

> I am handling a case where the parties really need an attorney to help them out. They keep coming to court, and I keep telling them that they need a lawyer. I finally realized that the only way they'll be able to get a lawyer is if I come up with the $5,000 retainer.
>
> —Family law judge

Court-based research and statistics also show that a small number of self-represented litigants could afford an attorney (possibly by making some significant sacrifice) but still choose not to use one. They are part of a larger do-it-yourself social movement to forgo various professional services, including real estate brokers, investment advisors, doctors, and lawyers.

It is important for judges to be aware that the "choice" not to have a lawyer is generally not a choice that litigants wish to make, but that litigants are trying to take care of problems in their lives in the best way that they can.

II. Barriers to Self-Represented Litigants in the Court System

Despite the many efforts at improving access to the courts for the self-represented, they still face many barriers, not all of which are obvious to those who work in the courts.

A. The Barrier of Legal Language

The specialized language of the courts, for example, can act as a barrier. To understand the impact of this barrier, it may be useful to reflect on experiences in hospitals. Hospital patients are often highly confused and intimidated by the many specialized terms that hospital staff use as shorthand. When used without explanation, these terms can be frightening to patients, who are at the mercy of the institution's procedures. This is heightened by the fact that the underlying problem

bringing them to the hospital is usually emotionally charged, and they are scared to be there in the first place.

Even when patients think that they understand what they are being told at the time, it's easy to be confused later when they try to remember what their doctor said or what actions they were supposed to take.

The experience of self-represented litigants in our courthouses and courtrooms is often similar.

People representing themselves often find it extremely difficult to understand the words used in the courtroom, particularly when the judge and staff use Latin or French terms that lawyers rely on as legal shorthand. This is even more complicated for those who do not speak English as their first language and who come from different cultures.

An obvious example is "pro per," an abbreviation for the Latin phrase "in propria persona," meaning "appearing on his or her own behalf," which is widely used in California trial courts. In fact, it has been said that "many pro pers do not even know that that is what they are." To avoid the confusing abbreviation, many judges and staff use "self-represented litigant."

B. The Complexity of the Clerk's Office

Litigants often find themselves in court clerks' offices that are confusing and crowded with lawyers and litigants wanting information and assistance with filling out forms, as well as performing the traditional filing tasks.

In many cases, clerks have in the past been explicitly trained to *never* answer any questions from the nonlawyer public. Such assistance has been perceived as violating the court's neutrality or as the unauthorized practice of law. Litigants therefore frequently still find their paperwork being refused as inappropriate or incomplete, but are given no help to correct it, no explanation of the problem or how to fix it, or no referral to someone who could help.

Self-represented litigants are often confused about the status of their case, what their next step should be, what the court has ordered, or even how to deal with conflicting orders that they didn't even know existed.

C. Problems With Service

As every judge and attorney knows, to obtain a court order, not only must the litigant file a motion, but he or she—not the court—is also responsible for seeing that the papers are properly served on the opposing party. This often complex set of requirements has been a major obstacle to self-represented litigants and a major source of delay for the courts for several reasons.

1. The litigants may not understand that the court will not effect, or be responsible for, service.

2. The litigants may not understand that they cannot serve the papers themselves on the opposing party.

3. The litigants may not be able to physically locate the other party that they are required to serve, or to navigate the complex procedural alternatives available.

4. The litigants may not know that they must have a written proof of service form, filled out by the person who effected the service, and that that the written proof must be presented to the court before most orders can be made.

5. Litigants may fill out the required proof of service form incorrectly.

6. Often the litigants are unaware of the alternative service methods available, what those often highly complex alternatives require, or how to access and make use of them. (How many judges or lawyers have tried to summarize the laws governing service in a few simple sentences?)

7. When litigants appear for their hearing without having successfully accomplished effective service or without a completed proof of service, the case will be postponed until a later date or dismissed. This causes distress and hardship to litigants, delays their ability to enforce important rights, and takes up valuable time for both the litigants and the court.

D. Legal Requirements That Are Not Intuitive

Most legal cases involve technical and sometimes superficially counterintuitive requirements that are confusing—even to lawyers with limited experience in a subject matter. For example, in family law, if there are financial issues of any kind involved, such as child or spousal support, the litigants are required to prepare detailed income and expense declarations prior to the court appearance. Frequently they are not aware of this requirement and fail to prepare the proper documents, which is likely to result in additional delays and frustration for all. In civil cases, defendants must serve an answer before they file it with the court. Some courts may require particular pleadings to be prepared on different colored forms or to comply with other local rules. These requirements are often tremendously frustrating for self-represented litigants.

E. Procedural Rules That Vary Between Types of Cases

California procedural rules in family cases require the parties to request a hearing in order for the case to move forward. The court does not routinely schedule such hearings on its own initiative. Many self-represented litigants are completely unaware of this requirement, which is inconsistent with the way that most nonjudicial institutions function. This can be particularly confusing if litigants have had experience in other types of cases, such as juvenile dependency or domestic violence, in which the court takes a much more active role in setting hearings and managing the cases.

In a San Diego study on why self-represented litigants hadn't finished their divorce cases after five months, 60 percent of such litigants either did not realize that there was anything more that they had to do or just did not know what to do. Nearly 20 percent were waiting to hear from the court before doing anything more.[2]

F. Overcrowded Dockets

All too often, cases with self-represented litigants are handled on highly crowded dockets. Time constraints and evidentiary issues can

[2] J. Greacen, *Developing Effective Practices in Family Law Caseflow Management* (Administrative Office of the Court's Center for Families, Children & the Courts, 2005), p. 25.

prevent litigants from communicating sufficiently, clearly, and comprehensively with the judge. Litigants often do not understand what information the judge needs to make a decision on a given issue and therefore often take court time asking judges and courtroom staff to explain legal terms and procedures to them. Frustration for both litigant and judge occurs when a self-represented party insists, often in good faith, on giving lengthy explanations about matters that he or she does not realize are irrelevant as a matter of law to the issue at hand.

G. Courts Often Do Not Prepare an Order After a Hearing

Each time there is a hearing in a case where the judge makes an order, the order needs to be memorialized in writing. It is usually the attorney's responsibility to prepare the written order after hearing. Self-represented litigants often do not know that this is required, let alone how to prepare such orders in a manner acceptable to the court and to law enforcement. As a result, they leave without written orders to which they can refer, and the court's action is therefore effectively unenforceable. The lack of enforcement of the court's action undercuts the legitimacy of and confidence in the legal system.

Without a written order, it is extremely difficult for litigants to be fully aware of their rights and responsibilities arising from the court's decision. Additionally, lack of a written order leaves the court file with only an abbreviated minute order for the judge to refer to when reviewing the file for future hearings. This makes enforcement of these orders well-nigh impossible.

Because self-represented litigants do not realize that they are generally required to prepare a proposed judgment for the court's review and signature, there may be no order at all, or inaccurate or incomplete judgment paperwork will often be processed and returned repeatedly before final judgment is eventually, if ever, entered. Often, the lack of an order does not come to the court's attention until there is a crisis and the order must be enforced.

H. Cases Can Be Dismissed Because of Litigants' Failures to Perform Steps of Which They Had No Knowledge

When self-represented litigants fail to take the necessary steps to complete their cases, the courts deem them abandoned and will dismiss such cases after several years, on the grounds of "lack of

prosecution." As many as one-third of all family law files from the 1980s prepared for archiving in one California trial court lack a final judgment,[3] which can obviously have serious and irreversible consequences for the litigants and their children.

I. Lack of Understanding of Orders and Judgments and How to Enforce Them

Litigants often do not understand the terms of the court's orders and judgments. Without an attorney, they have no one to help them interpret those terms or their implications. Moreover, litigants often lack an understanding of the legal mechanisms for enforcing the terms of a court's judgment. Many expect the court to enforce its orders on its own. If the other party does not comply voluntarily, they are at a loss as to how to proceed.

J. No Right to Interpreters in Civil Cases

Most courts are unable to offer interpreters in civil cases, and there is no legal right to an interpreter recognized in most civil cases. Thus limited-English-speaking litigants have neither an attorney nor an interpreter to help them navigate or understand the court system or understand and participate in hearings and trials. Family members and friends who may be enlisted to assist might or might not have adequate language skills, especially when it comes to legal terminology, or may have conflicts of interest that make their translation suspect. Judges find it extremely frustrating to hear a non-English-speaking litigant talk for one minute and have it translated as "no"; they find it troubling that they may be making rulings without having all the relevant information. Similarly, litigants who do not know what they or the other parties were ordered to do, or why they were ordered to do it, are likely to fail to comply with the order. They could then be violating a court order without intending to do so, with serious consequences.

[3] *Ibid*.

Conclusion

Generally, self-represented litigants do not choose to be without lawyers; they want to play by the rules, but they still face a wide and complicated variety of barriers to access.

This information should guide the approach of the courts, judges, and court staff as they seek to make sure that the system as a whole is accessible to all. The remaining chapters of this benchguide seek to serve that goal.

Chapter 2: Expanding Access to the Court Without Compromising Neutrality

2

Expanding Access to the Court Without Compromising Neutrality

Introduction

Some judges instinctively feel that involving themselves actively in a hearing or trial—as is often necessary if the judge is to obtain needed information from self-represented litigants—may cause one or more of the parties to the proceeding to perceive that the judge failed to maintain judicial neutrality. On the contrary, such active involvement is not only fully consistent with access to justice, and often required by it, but can enhance the court's neutrality.[4]

The Court of Appeal has explicitly recognized the necessity for, and has approved, such judicial behavior:

> We know the litigants, both plaintiffs and defendants, are unrepresented by counsel in the vast majority of cases—as was true here. We also know this fact influences how these hearings should be conducted—with the judge necessarily expected to play a far more active role in developing the facts, before then making the decision whether or not to issue the requested permanent protective order. In such a hearing, the judge cannot rely on the pro per litigants to know each of the procedural steps, to raise objections, to ask all the relevant questions of witnesses, and to otherwise protect their due process rights.
>
> *Ross v. Figueroa* (2006) 139 Cal.App.4th 856; 43 Cal. Rptr. 3d 289.

[4] The concepts in this chapter derive in significant part from those developed in R. Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality, When Parties Appear Pro Se*, 23 Georgetown Journal of Legal Ethics, 423 (2004).

This evolving understanding also reflects the findings in the report by the National Center for State Courts, Trust and Confidence in the California Courts 2005, which found that attorneys were most often concerned with fairness in terms of the substantive legal outcomes of cases. Citizens' views of the courts, however, are heavily influenced by their perceptions of the courts' ability to deliver a fair process.[5]

I. Substantive Justice

While the public focuses heavily on procedural justice matters, it is imperative that concern for substantive justice be given equal attention in cases involving self-represented litigants.

To decide cases fairly, judges need facts, and in self-represented litigant cases, to get facts, judges often have to ask questions, modify procedure, and apply their common sense in the courtroom to create an environment in which all the relevant facts are brought out.

In short, judges have found as a practical matter that a formalized, noncommunicative role in dealing with cases involving self-represented litigants can lead to serious decision-making problems. Without the additional facts that active judicial involvement brings to light, judges are at risk of making wrong decisions.

II. Procedural Justice

Over the last 30 years, research has repeatedly established that when litigants perceive that a decision-making process is fair, they are more likely to be satisfied with the outcome.[6]

Perceptions of the importance of fairness do not appear to be related to any particular cultural background or other personal characteristic of the litigant, but are universal.[7]

The elements of "procedural justice" that have been established in the research literature closely mirror broad concepts deeply familiar to and

---

[5] Attorneys, interestingly, are more concerned with the fairness of the *outcomes* of the cases than with the fairness of the process by which the outcomes are attained.
[6] C. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, NJ: Lawrence Erlbaum, 1975).
[7] T. Tyler, *What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures* (1988) 22 Law & Soc'y Rev. 103.

heavily ingrained in lawyers and judges from their legal training in procedure and due process.

A. "Voice"—the Opportunity to Be Heard

For litigants to feel that a process is fair, they must feel that they have had a "voice" in the process. They need an opportunity to be heard by the decision-maker. For litigants to believe that they have had an opportunity to participate in the decision-making process, two things must occur:[8]

1. There must be an opportunity for input into the decision-making process; and,

2. This input must have some effect on the decision-maker. If litigants perceive that their contribution is not heard or considered, then the "voice" is lost.

When self-represented litigants are stumbling in their stories, confused by the foundational requirements of some forms of evidence and unable to get relevant facts before the court, they do not have a genuine voice in their cases. California judges have long been asking questions of the litigants themselves, following up when those questions are answered inadequately, summarizing the law when that is helpful to move the case forward, and answering the parties' questions about the proceedings when such answers are helpful in promoting understanding and compliance.

B. Neutrality

Litigants expect judges to be honest and impartial decision-makers who base decisions on facts and law. This includes the ability to suppress any bias the judge may have and to avoid showing favoritism.[9] It also involves consistency such that there should be similar treatment across people and time.[10]

---

[8] *Cal. Benchguide 54*, *supra*; Connor, *Pro Per Problems and Difficult Defendants*, *supra*; "Pro Per Courtroom," *supra*.

[9] T. Tyler, "The Psychology of Procedural Justice: A Test of the Group-Value Model" (1990) 57(5) *Journal of Personality and Social Psychology* 830–838.

[10] G. S. Leventhal, "What Should Be Done with Equity Theory?" in *Social Exchange: Advances in Theory and Research* (K. J. Gergen, M. S. Greenberg, and R. H. Weiss, eds., New York: Plenum, 1980).

Judges always need to be diligent about neutrality issues when interacting with self-represented litigants, just as they are with attorneys; however, the goal is to avoid prejudice and bias—not to avoid communication. Communication between judges and the participants in hearings, particularly hearings without juries, is critical. The ability to conduct impartial and neutral communications comfortably with all courtroom participants is a huge benefit for any judge hearing large numbers of cases involving self-represented litigants.

Conversely, when a judge feels the need to restrict such communication, he or she may risk seriously impeding one or the other side of a self-represented litigant case from adequately presenting its position, thereby creating the appearance of bias and limiting the facts on which the court can base its decision. For example, a judge may hesitate to inform a party that for a document to be considered, a proper foundation must be laid, for fear that giving the litigant this information will be seen as taking sides. Or the judge may hold back from pursuing a line of questioning, even if the answers would provide information needed to decide the case fairly, to prevent the appearance of trying to help the litigant provide the "right" answer. In either case, lack of communication from the judge has potentially hampered one side of the case and inhibited the court's ability to base its decision on the law and the facts.

As shown in detail in the discussion in chapter 3, both the California Code of Judicial Ethics and the American Bar Association's Model Code of Judicial Conduct encourage proper unbiased judicial communication that promotes high-quality decision making. There is nothing in the Code of Judicial Ethics, in the reports of disciplinary proceedings, or in the California case law that prohibits such nonprejudicial judicial communication or engagement. Rather, what is prohibited is nonneutrality or bias.[11]

Indeed, we know of no reported cases in which a decision has been reversed or a judge disciplined merely for such nonprejudicial

[11] The California Code of Judicial Ethics requires, at canon 2, that a judge "avoid impropriety and the appearance of impropriety in all of the judge's activities" and, at canon 3, that he or she shall "perform the duties of judicial office impartially and diligently."

engagement in fact-finding. To the extent that decisions are reversed, or judges disciplined, it is for aggressively biased activity in a case.[12]

C. Trustworthiness

Litigants expect judges to be basically benevolent toward them, to be motivated to treat them fairly, to be sincerely concerned with their needs, and to be willing to consider their side of the story.[13]

Litigants pay close attention to their perceptions of each individual judge's motivation toward them and toward others in the courtroom. If participants believe that the judge was trying to be fair, they tend to view the entire procedure as a fair one. Similarly, if the judge treats people politely, and exhibits a clear concern for their rights, litigants are likely to view the entire process as fair.[14]

When the judge asks questions, explains requirements or the law, and takes steps to move the case along—and does so in an evenhanded manner applied to both sides—the judge's motivations are far easier for the litigants to read than if the judge is noncommunicative. Lack of communication provides little on which an observer can base a judgment of neutrality or other trustworthiness, except the ultimate decision, which may well be subject to a very broad range of interpretation. Litigants may focus on a casual gesture, fleeting facial expression, or perceived inattention to a presentation (e.g., when the judge is reading documents in the file) and may completely misinterpret a judge's motivation toward them.

---

[12] U.S. cases and decisions are collected and analyzed in Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants* (Winter 2003) 41 Judges' Journal 16; and R. Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications* (2004) 23 G. J. Legal Ethics 423, esp. notes 17 and 18 at page 430, and text and notes at pages 448–452. California cases are discussed in chapter 3, below.

[13] Tyler, "Psychology of Procedural Justice."

[14] Tyler, *What Is Procedural Justice?*

D. Interpersonal Respect

When litigants are treated as valued members of society, they are more likely to feel satisfied that the process is fair. Litigants must be treated with dignity and respect by judges and courtroom staff.[15]

Interchanges between judges and litigants in a courtroom setting are clearly not conducted in a manner socially familiar to most self-represented parties. If conducted in too formal a manner, the communication style can be legally arcane and seem almost hostile; if conducted in too informal a manner, there may be a risk of appearing undignified or disrespectful to litigants because they are without counsel, or even seeming too relaxed about attention to their legal rights.

When litigants feel insecure about their own status in a situation, they place increased attention on how they are treated by decision-makers;[16] therefore, self-represented litigants can be expected to pay close attention to the judge in an attempt to see how that judge is regarding them. If a judge is highly resistant to any type of interchange with litigants, there will be little data for them to use to assess the judge's attitude toward them, which may lead litigants to seize inappropriate cues on which to base their conclusion. For example, a judge exercising this type of detachment may be misinterpreted as disliking the litigant or being cold, uncaring, or disrespectful.

Generally speaking, being informed, prepared, and willing to get to the issues in a businesslike and friendly manner demonstrates respect for the litigants. Taking the time to listen to the positions of both sides and to communicate clearly the basis of the ultimate decision can result in a feeling of calm reassurance and stability that is almost palpable in the courtroom. In such circumstances it is not uncommon for even the losing party to leave the courthouse with a sense of satisfaction at being treated with dignity and respect.

---

[15] Tyler, "Psychology of Procedural Justice."
[16] Tyler, *What Is Procedural Justice?*

E. Demeanor of the Proceedings

Litigants value proceedings that are dignified, careful, understandable and comfortable for them. They have even ranked these factors above "voice" in importance. Therefore, the calm, well-organized management of the proceedings and of the courtroom is extremely important.[17]

There are a variety of steps a judge might take to create a procedurally fair and easily understood courtroom environment. Judges may want to implement structured court procedures so that each side has the greatest possible opportunity to be heard. This is done by being consistent in giving litigants the opportunity to explain why they are in court and what they want.

Judges can make it clear to the litigants that they have read and considered their submitted documents. Judges then have the option of asking for clarification, explanation, or more specific detail as needed. This process does not mean relinquishing control of the courtroom. To the contrary, it will allow judges to more easily limit the information to that which is relevant to their decision.

Judges can make opening statements explaining the process used in the courtroom. During the hearing, judges can break the case up into steps and explain what information is needed in each phase. Likewise, evidentiary rulings present an opportunity for the judge to explain the basis for a ruling in favor of or against admissibility in plain English.

A judge's decision that follows these precepts will be much more comprehensible, even if the outcome is not what the litigant desired. Probably most importantly, the parties and observers will walk away with a greater understanding of the process as a whole and with a realistic perception of fairness as to the particular decision made by the court.

---

[17] E. A. Lind, R. J. Maccoun, P. A. Ebener, W. C. F. Felstiner, D. R. Hensler, J. Resnick, and T. R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System* (1990) 24 Law & Soc'y Rev. 953–995.

Conclusion

All litigants deserve to have decisions made on the basis of the facts and the law. The ability of a judge to conduct friendly, businesslike, and unbiased communication with self-represented litigants to obtain the best information on which to base high-quality decision making, and to convey the proper attitude of the court toward them, is an enormous benefit.

Chapter 3: California Law Applicable to a Judge's Ethical Duties in Dealing With Self-Represented Litigants

3

California Law Applicable to a Judge's Ethical Duties in Dealing With Self-Represented Litigants

Introduction

California law—case law, ethical opinions, and judicial discipline decisions—supports the concepts outlined in chapter 2. Moreover, it provides a variety of concrete examples of appropriate behavior and underlines the breadth of discretion granted a trial judge.

I. Overview—the Ethical Rules Support Access and Neutrality

Judges dealing with self-represented litigants in the courtroom are subject to two ethical duties that may appear at first glance to conflict. Canon 3B(7) of California's Code of Judicial Ethics requires a judge to "accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law." Canon 2A requires the judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." These canons follow those of the American Bar Association's Model Code of Judicial Conduct.

Many judges fear that the actions required to ensure a self-represented litigant's "right to be heard" might be viewed as violating the court's duty of impartiality, and they feel that the duty of impartiality must trump the duty to ensure a litigant's right to be heard.

However, the American Bar Association Standards Relating to Trial Courts, standard 2.23, takes a very different view, finding no inherent

conflict between the two duties; rather, both may be met at the same time:

> **Conduct of Cases Where Litigants Appear Without Counsel. When litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to insure a fair trial.**
>
> *Commentary*
>
> The duty of the courts to make their procedures fair is not limited to appointing counsel for eligible persons who request representation. In many instances, persons who cannot afford counsel are ineligible for appointed counsel; in other cases, persons who can afford counsel, or who are eligible to be provided with counsel, refuse to be represented. . . .
>
> All such situations present great difficulties for the court because the court's essential role as an impartial arbiter cannot be performed with the usual confidence that the merits of the case will be fully disclosed through the litigant's presentations. These difficulties are compounded when, as can often be the case, the litigant's capacity even as a lay participant appears limited by gross ignorance, inarticulateness, naivete, or mental disorder. They are especially great when one party is represented by counsel and the other is not, for intervention by the court introduces not only ambiguity and potential conflict in the court's role but also consequent ambiguity in the role of counsel for the party who is represented. *Yet it is ultimately the judge's responsibility to see that the merits of a controversy are resolved fairly and justly. Fulfilling that responsibility may require that the court, while remaining neutral in consideration of the merits, assume more than a merely passive role in assuring that the merits are adequately presented.*
>
> The proper scope of the court's responsibility is necessarily an expression of careful exercise of judicial discretion and cannot be fully described by specific formula. . . . *Where litigants represent themselves, the court in the interest of fair determination of the merits should ask such questions and suggest the production of such evidence as may be necessary to supplement or clarify the litigants' presentation of the case.* (Italics added.)

In 2006 the American Bar Association took the first steps to further clarify this lack of inconsistency by proposing changes in the commentary to the Model Code of Judicial Conduct itself. The ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct has proposed that comment 3 to rule 2.06 (currently canon 2A on impartiality) be modified as follows:[18]

> *To ensure impartiality and fairness to all parties, a judge must be objective and open-minded, and must not show favoritism to anyone.* ***It is not a violation of this Rule, however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.*** *(Proposed new text in* ***bold****)*

That the proposal is not for new language in a rule, but for an expansion of a comment, emphasizes that this does not represent a departure or change in underlying law. While California appellate decisions do not generally deal with the issue in the explicit context of the judge's formal ethical obligations, the general literature on this topic (on which this chapter has drawn heavily) does do so.[19]

II. General Principles from California Case Law

A self-represented litigant in California has the right "to appear and conduct his own case." *Gray v. Justice's Court of Williams Judicial Township* (1937) 18 Cal.App.2d 420 [63 P.2d 1160].

The court has a general duty to treat a person representing himself or herself in the same manner as a person represented by counsel:

> A lay person, who is not indigent, and who exercised the privilege of trying his own case must expect and receive the same treatment as if represented by an attorney—no different,

---

[18] This proposal is scheduled to be considered by the American Bar Association at its Mid-Year Meeting in February 2007.

[19] C. Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (Des Moines, IA: American Judicature Society, 2005); Zorza, p. 423; Albrecht et al., p. 16; *Minnesota Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants* (reprinted in Albrecht et al.).

> no better, and no worse. *Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1009 [98 Cal.Rptr. 855].[20]

This principle's application is straightforward and obvious as it applies to the basic substantive legal principles governing the right to legal relief. The elements required to obtain a judgment and the burden of proof are the same for a self-represented litigant as for a litigant represented by counsel. All persons are equal in the eyes of the law.

California case law also applies the principle of same treatment to the rules of evidence and procedure:

> A litigant has a right to act as his own attorney . . . but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise ignorance is unjustly rewarded. *Doran v. Dreyer* (1956) 143 Cal.App.2d 289, 290, 299 [P.2d 6611].

This rule's application is also straightforward—in part. Inadmissible evidence cannot serve as the basis for awarding relief to a self-represented litigant, and a self-represented litigant must follow the requirements of the rules of procedure.

However, there are also four[21] important related principles that California trial judges must also take into account.

The first is the judiciary's preference to resolve matters on their merits rather than by procedural default.

---

[20] This language was taken originally from a 1932 Arizona Supreme Court decision, *Ackerman v. Southern Arizona Bank & Trust Co.* (1932) 39 Ariz. 484 [7 P.2d 944]. Only one subsequent case, *Monastero v. Los Angeles Transit Company* (1955) 131 Cal.App.2d 156, 280 [P.2d 187], discusses whether a self-represented litigant had the means to retain counsel. It is fair to say, therefore, that the principle is not limited to self-represented litigants with means but applies to all self-represented litigants—indigent as well as wealthy.

[21] The California Supreme Court, in *Rappleyea v. Campbell*, 8 Cal.4th 975, 884, P.2d 126, 35 Cal.Rptr.2d 669 (1994), greatly curtailed the existence of a fifth exception established in *Pete v. Henderson*, 124 Cal.App.2d 487, 491, 269 P.2d 78 (1st Dist. Div. 1, 1954), that when trial judges have discretion in applying procedural rules, the court is required to take into account a litigant's self-represented status in exercising that discretion. In *Rappelyea*, Justice Mosk, writing for the majority, stated that this rule "should very rarely, if ever, be followed." "We make it clear that mere self-representation is not a ground for exceptionally lenient treatment." *Supra,* at 985.

> It has always been the policy of the courts in California to resolve a dispute on the merits of the case rather than allowing a dismissal on technicality. *Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1061 [223 Cal.Rptr. 329] (Acting P.J. Liu, dissenting).
>
> The trial of a law suit is not a game where the spoils of victory go to the clever and technical regardless of the merits, but a method devised by a civilized society to settle peaceably and justly disputes between litigants. The rules of the contest are not an end in themselves. *Simon v. City and County of San Francisco* (1947) 79 Cal.App.2d 590, 600 [180 P2d.398], cited by *Adams v. Murakami* (1991) 54 Cal.3d 105,120.

This principle requires the judge not to allow procedural irregularities to serve as the basis for precluding a self-represented litigant from presenting relevant evidence or presenting a potentially valid defense.

The second is the trial judge's duty to avoid a miscarriage of justice.

> The trial judge has a "duty to see that a miscarriage of justice does not occur through inadvertence." *Lombardi v. Citizens Nat. Trust & Sav. Bank* (1951) 137 Cal App.2d 206, 209, [289 P.2d 8231].
>
> In the United States we have what is often called an "adversarial system" of justice. . . . However, because it is adversarial—as distinct from "inquisitorial"—it is sometimes easy to forget that the purpose of the system is not to hold a contest for its own sake. The purpose of our system of justice is still, in Justice Traynor's phrase, "the orderly ascertainment of the truth" (Jones v. Superior Court (1962) 58 Cal.2d 56, 60 . . .) and the application of the law to that truth. Just because a court must rely on fallible litigants to present competent evidence does not vitiate the fundamental purpose of the proceeding, which is most assuredly not to have a contest but to establish what actually happened. The adversarial system works not because it is a contest to see who has the cleverest lawyer but because allowing two or more sides to present evidence to a neutral decision maker is an epistemologically sophisticated way to get at the truth. And while certain aspects of the law, namely the fact that there are fixed rules and outcomes, allow it to be analogized to a game, it is most definitely not a spectator sport. . . .

The third is that treatment equal to that of a represented party requires the court to "make sure that verbal instructions given in court and written notices are clear and understandable by a layperson." *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284 [111 Cal. Rptr.2d 439, 445]. The court explained this requirement in the following paragraph of its opinion:

> There is no reason that a judge cannot take affirmative steps—for example, spending a few minutes editing a letter or minute order from the court—to make sure any communication from the court is clear and understandable, and does not require translation into normal-speak. . . . Judges should recognize that a pro per litigant may be prone to misunderstanding court requirements or orders—that happens enough with lawyers—and take at least some care to assure their orders are plain and understandable. Unfortunately, the careless use of jargon may have the effect, as in the case before us, of misleading a pro per litigant. The ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system. *Id.* at 1285, pp. 445–446.

The fourth is that the "same treatment" principle does not prevent trial judges from providing assistance to self-represented litigants to enable them to comply with the rules of evidence and procedure.

In *Monastero v. Los Angeles Transit Company* (1955) 131 Cal.App.2d 156 [280 P.2d 187], the trial judge "labored long and patiently to convince plaintiff of the folly of conducting a jury case in person, she being untrained in the law. He offered to arrange a continuance in order to enable her to get an attorney for the trial but she was insistent upon her right to represent herself." At the close of the testimony (during which the plaintiff thoroughly discredited her own case), the judge ordered opposing counsel to hand "to Miss Monastero instructions that ordinarily would be requested in conjunction with matters of this kind." According to the Court of Appeal, the judge "continued throughout the trial to assist plaintiff in the presentation of her case, guiding her as to peremptory challenges, assisting her in examining jurors as to cause for challenge, advising her of the right to examine [the defendant], advising efforts to compromise, emphasizing the duty of defendant to exercise the highest degree of care and carefully scrutinizing all proffered instructions." On appeal from the court's judgment rendered on the basis of the jury's verdict in favor of the defendant, plaintiff (at this point represented by counsel) contested

the propriety of the court's requiring defendant's attorney to assist plaintiff in preparing instructions.

The Court of Appeal held that plaintiff was in no way prejudiced by the manner in which the instructions were prepared, the appellate court noting that the trial judge prepared and gave two additional instructions on his own motion, both of which were intended to clarify the plaintiff's rights. The Court of Appeal did not find fault with the court's extensive assistance to the plaintiff. Rather, it refers to those efforts with approval, calling the plaintiff's arguments on appeal that the court had erred in requiring defendant's counsel to assist the plaintiff as "startling."

California appellate courts often recite the principal of same treatment in affirming a trial judge's discretionary decisions not to provide specific assistance. However, the courts in the same opinions recite, with apparent approval, the steps the trial judge *did take* to accommodate the special needs of the self-represented litigant—treating him or her differently than the court would have, or did, treat a party represented by counsel. The cases are summarized below.

III. A Summary of the General State of the Law

California appellate decisions and disciplinary actions can therefore be summarized as follows:

1. The trial judge has broad discretion to adjust procedures to make sure a self-represented litigant can be heard, or to refuse to make such adjustment.

2. The judge will always be affirmed if he or she makes these adjustments without prejudicing the rights of the opposing party to have the case decided on the facts and the law.

3. The judge will usually be affirmed if he or she refuses to make a specific adjustment, unless such refusal is manifestly unreasonable and unfair.

Future development of the law will likely focus on the boundaries of the judge's discretion—those circumstances in which a judge must make adjustments in order to permit a self-represented litigant to be heard and those circumstances in which a judge is viewed as acting with

prejudice to the rights of the other party to have its case decided on the facts and the law.

The current boundaries can be discerned from the caselaw and disciplinary decisions summarized briefly below.

IV. The Current Boundaries of Judicial Discretion Established by California Appellate and Disciplinary Decisions

A. What Judges Can Do

Listed below are actions of trial judges assisting self-represented litigants upheld on appeal and additional actions recited in appellate opinions with apparent approval.

Liberally construing documents filed

California courts generally construe filings in the manner most favorable to self-represented litigants and overlook technical mistakes they may make in pleading.

In *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623 [178 Cal.Rptr. 167], the Court of Appeal noted that the appellant erroneously stated that he appealed from the verdict and notice of entry of judgment. The court construed the appeal from the notice of entry of judgment as taken from the judgment and dismissed the purported appeal from the verdict.[22]

In *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 884 P.2d 126 [35 Cal.Rptr.2d 669], the Supreme Court ruled that the trial court erred in refusing to vacate a default judgment when shown that the clerk of the court had given self-represented defendants who lived out-of-state erroneous information about the required filing fee, leading to rejection of a timely filed answer. The defendants had filed a motion for relief from default before the default judgment was entered.

In *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284 [111 Cal.Rptr.2d 439, 445], the Court of Appeal reversed the trial court's refusal to vacate its dismissal of the complaint, finding that the court abused its discretion in not providing the self-represented litigant—who

[22] *Nelson*, *supra*, 125 Cal.App.3d at p. 629, fn. 1.

lived in South Dakota, who was permanently disabled from an accident that shattered a disk in her neck, and whose attorney had withdrawn from the case—a further opportunity to prosecute her case despite her procedural defaults, which appeared to arise from her misunderstanding of court correspondence and court procedures.

In *Baske v. Burke* (1981) 125 Cal.App.3d 38 [177 Cal.Rptr. 794], the self-represented defendant sent several handwritten letters to the clerk of the superior court. Though the letters contained statements sufficient to constitute an answer to the complaint, the clerk merely placed them in the court record without bringing them to the judge's attention. Even though the defendant's motion to set aside the default judgment was filed over six months after entry of the judgment, the trial court granted the motion to set aside. The Court of Appeal affirmed that decision, ruling that the clerk's failure constituted extrinsic mistake providing a ground for the trial court to vacate the judgment.

Allowing liberal opportunity to amend

In *Harding v. Collazo*, *supra*, the Court of Appeal noted with apparent approval the court's giving a self-represented litigant multiple opportunities to amend his complaint to state facts sufficient to constitute a valid claim for relief.

Assisting the parties to settle the case

In *Monastero v. Los Angeles Transit Company*, *supra*, the Court of Appeal noted with apparent approval the trial court's advising the parties on efforts to compromise the case.

Granting a continuance sua sponte on behalf of the self-represented litigant

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeal noted with apparent approval the trial court's granting a continuance to allow the self-represented litigant an opportunity to obtain counsel. In *Taylor v. Bell, supra,* the Court of Appeal affirmed the trial court's sua sponte vacating the submission of a case following trial and setting the matter for further hearing to allow the self-represented litigant to call a witness.

Explaining how to subpoena witnesses

In *Taylor v. Bell, supra,* the Court of Appeal noted with apparent approval the trial court's advising the self-represented litigant of her right to subpoena witnesses.

Explaining how to question jurors and exercise peremptory challenges and challenges for cause

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeal noted with apparent approval the trial court's instructing the self-represented litigant about the use of peremptory challenges and the examination of potential jurors to identify cause for challenges.

Explaining the legal elements required to obtain relief

In *Pete v. Henderson*, *supra* note 3, in a portion of its opinion not disapproved by the Supreme Court, the Court of Appeal noted that "one of the chief objects subserved by a motion for nonsuit is to point out the oversights and defects in plaintiff's proofs, so he can supply if possible the specified deficiencies." (P. 491.)

Explaining how to introduce evidence

In *Lombardi v. Citizens National Trust and Savings Bank of Los Angeles, supra,* the Court of Appeal expressed approval of the "customary practice" of the trial judge's making suggestions to assist a self-represented litigant in the introduction of evidence. In *Nelson v. Gaunt, supra,* the Court of Appeal noted with apparent approval the trial judge's explaining the proper procedure for admission of evidence, in the jury's presence. The trial judge in that case also met with the self-represented litigant and opposing counsel each day prior to the seating of the jury to discuss anticipated testimony and evidence, and any objections that might be appropriate.

Explaining how to object to the introduction of evidence

In *Nelson v. Gaunt, supra,* the Court of Appeal noted with apparent approval the trial judge's explaining the proper procedure for objecting to opposing counsel's introduction of evidence.

Explaining the right to cross-examine witnesses presented by the opposing party

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeal noted with apparent approval the trial court's advising the self-represented litigant about her right to question opposing witnesses.

Calling witnesses and asking questions of them

In *Taylor v. Bell, supra,* the Court of Appeal noted with apparent approval the trial judge's calling the self-represented litigant as a witness and posing questions to her.

Sua sponte admonishing the jury on behalf of a self-represented litigant to disregard statements of witnesses

In *Nelson v. Gaunt, supra,* the Court of Appeal noted with apparent approval the trial judge's sua sponte admonitions to the jury.

Preparing jury instructions for a self-represented litigant or requiring opposing counsel to do so

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeal noted with apparent approval the trial court's preparation of instructions for the self-represented litigant. It explicitly affirmed the trial court's requiring opposing counsel to provide the litigant with the jury instructions that would usually be submitted by the plaintiff.

B. What Judges Are Required to Do: Procedural Accommodations That a Trial Judge Must Provide to a Self-Represented Litigant

The federal courts and some state courts recognize affirmative duties on the part of trial judges to accommodate the needs of self-represented litigants, such as a duty to inform a litigant how to respond to a motion for summary judgment. *Hudson v. Hardy* (D.C. Circuit 1968) 412 F.2d 1091; *Breck v. Ulmer* (Alaska 1987) 745 P.2d 66.[23]

[23] The Supreme Court of the United States has decided two cases raising the issue of a federal trial judge's affirmative duty to provide information to a self-represented litigant, imposing such a duty in *Castro v. United States* (2003) 124 U.S. 786 and refusing to impose a duty in *Pliler v. Ford* (2004) 124 U.S. 2441. In *Castro* the Court held that a federal district judge must inform a prison inmate when the judge proposes to recharacterize a Fed. R. Crim. P. 33 motion (which is not cognizable) as a motion under 28 USC section 2255 (which is cognizable, but would cause any future section 2255 motion to be subject to the restrictions on "second or

California's appellate courts have not, with the exception of *Ross v. Figueroa* discussed below, articulated any such affirmative duties. They have considered all such actions to fall within the trial judge's discretion and have consistently affirmed a trial judge's refusal to exercise such discretion to provide assistance to a self-represented litigant in the courtroom.

In *Ross v. Figueroa* (2006) 139 Cal.App.4th 856; 43 Cal. Rptr. 3d 289, the Court of Appeal articulated an affirmative duty of accommodation—advice from the judge of the litigant's right to present oral testimony—in narrow circumstances arising in a domestic violence proceeding.

> After his request for continuance had been denied and it was revealed Figueroa had a written statement but had not served it on Ross, he asked the referee if he nevertheless could present this evidence. The referee merely answered "no," and proceeded to rule, granting a permanent injunction for the maximum period of three years.
>
> At that point, especially in a proceeding largely used by pro pers and in which Figueroa was in fact participating on a pro per basis, the referee should have advised Figueroa he could provide oral testimony, even though he would not be permitted to file the written statement he had failed to timely serve on Ross. It is true Figueroa had mentioned his witnesses were not present and thus he was in no position to offer their oral testimony. But he certainly could have testified himself and raised questions to be posed to Ross, had the referee advised him of his right to do so. The role of a judicial officer sitting in such a court, which has many attributes of an inquisitorial as opposed to an adversarial process, is different than when sitting in a purely adversarial court where the parties are presumed to be "well counseled" by skilled and knowledgeable lawyers.
>
> In a purely adversarial setting it is reasonable for the judge to sit back and expect a party's lawyer to know about and either assert or by silence forfeit even the most fundamental of the party's constitutional and statutory procedural rights. But not so in a

---

subsequent" such motions) and give the litigant the opportunity to withdraw or amend the motion. In *Pliler* the Court held that a federal district judge does not have a duty to inform a habeas corpus petitioner of all the options available before dismissing a petition that included both exhausted and unexhausted claims (claims in which the petitioner had and had not exhausted all available state court remedies).

judicial forum, such as this domestic violence court, which can expect most of those appearing before the court to be unrepresented. . . . Accordingly, here it was incumbent on the referee to apprise Figueroa it was his right to present oral testimony when Figueroa indicated he wanted to put on a defense by asking whether he could tender the written evidence he had prepared but not served. *Ross v. Figueroa* (2006) 139 Cal.App.4th 856; 866 (footnotes deleted).

C. What Judges Need Not Do: Instances in Which Judges Have Been Affirmed for Failing to Make Specific Accommodations for Self-Represented Litigants

The Court of Appeal has upheld a trial judge's refusing to advise a self-represented litigant how to introduce evidence in the face of the "dead man's statute" in the following case: *Lombardi v. Citizens National Trust and Savings Bank of Los Angeles, supra,* refusing to advise whether the litigant had a right to depose a witness; *Taylor v. Bell supra* and *Nelson v. Gaunt, supra* failing to prevent opposing counsel from committing prejudicial misconduct in his arguments to the jury;, failing to grant a third opportunity to amend a complaint, *Harding v. Collazo, supra.*

D. What Judges Cannot Do: Judicial Actions Deemed Inconsistent With Judicial Neutrality

In effect acting as counsel for self-represented litigants

A judge "is not required to act as counsel" for a party conducting an action in propria persona, *Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1009 [98 Cal.Rptr. 855], and is not allowed to do so. *Inquiry Concerning Judge D. Ronald Hyde, No. 166* (Commission on Judicial Performance 1973).

One count in the commission's removal of Judge Hyde from office described an incident in which the judge became the advocate for a party. The judge observed a defendant gesturing to his wife, who was sitting in the audience, that he was going to slit her throat. The judge ordered the man, who was in court for arraignment on a misdemeanor domestic violence case, removed from the courtroom. On the date of his next court appearance, the judge spoke with the wife, who told him that she was filing for dissolution of the marriage and wanted to serve

her husband that day. The judge went with the wife to the clerk's office, assisted her in filling out a fee waiver application, went to the office of the commissioner responsible for reviewing such applications and ensured that it got immediate attention, carried the signed fee waiver order to the clerk's office where the dissolution petition was filed and a summons issued, and took the summons and petition to his own deputy, who served them on the husband before he was transported back to the jail. The commission concluded that the judge's behavior had "embroiled" him in the matter, evidenced a lack of impartiality, and constituted prejudicial misconduct.

In *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 754 P.2d 724 [247 Cal.Rptr. 378], the Supreme Court upheld the removal from office of a judge, among other reasons, for "conducting his own investigation" of an evidentiary matter during a criminal jury trial involving a hit-and-run accident. The judge directed his bailiff to contact a local auto dealer's parts manager to inquire about a rear light lens for the type of vehicle driven by the defendant, so that he could compare the lens with trial evidence. On his lunch break, the judge sought out the parts manager with the lens and determined that the lens matched the defendant's car. Back in court, the judge interrupted the defense case and called the parts manager as the court's own witness. The judge did this with minimal notice to the parties and over objection from both sides. The defendant's resulting conviction was later set aside by the appellate department of the superior court because of the judge's misconduct. The appellate department, *People v. Handcock,* (1983) 145 Cal.App.3d Supp. 25, 193 Cal. Rptr. 397, held that although a judge may call and examine witnesses (Evid. Code § 775), the manner in which Judge Ryan placed his own witness on the stand (by interrupting the defendant's testimony) seriously prejudiced the defendant.

Wegner v. Commission on Judicial Performance (1981) 29 Cal.3d 615, 175 Cal.Rptr. 420, 630 P.2d 954 involved the same issue. Judge Wegner, suspecting that one of the parties made false statements in briefing the case, conducted his own investigation. The Supreme Court stated, "By undertaking a collateral investigation [the judge] abdicated his responsibility for deciding the parties' dispute on pleadings and evidence properly brought before him." 29 Cal.3d 615, at 632.

Denying rights of self-represented litigants

The Supreme Court and the Commission on Judicial Performance have, on numerous occasions, disciplined judges or removed them from

office for their denial of the rights of unrepresented litigants appearing before them.

In *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 787 P.2d 591 [267 Cal.Rptr. 293], the Supreme Court removed a judge from office for, among other things, rudeness to pro per litigants in criminal cases.

In *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 526 P.2d 268 [116 Cal.Rptr. 260], the court censured a judge for, among other things, bullying and badgering pro per criminal defendants.

In *Inquiry Concerning Judge Fred L. Heene, Jr., No. 153* (Commission on Judicial Performance 1999), the commission censured a judge for, among other things, not allowing an unrepresented defendant in a traffic case to cross-examine the police officer and failing, in several cases, to respect the rights of unrepresented litigants.

In *Inquiry Concerning a Judge, No. 133* (Commission on Judicial Performance 1996), the commission censured a judge for, among other things, pressuring self-represented litigants to plead guilty, penalizing a self-represented litigant who exercised his right to trial, and conducting a demeaning examination of an unrepresented litigant.

A trial judge may not deny the parties their procedural due process rights by preempting their ability to present their case. In *Inquiry Concerning Judge Howard R. Boardman, No. 145* (Commission on Judicial Performance 1999), the commission concluded that Judge Boardman committed willful misconduct by depriving the parties of their procedural rights in *King v. Wood.* The case, filed by a self-represented litigant, involved a quiet title action concerning a home. The counsel for the opposing party was trying his first case. Judge Boardman called the case for trial and, telling the parties that he was proceeding “off the record” and without swearing the parties, asked them to tell him what the case was about. The self-represented litigant spoke, followed by the lawyer’s opening statement and his client’s statement. The judge alternated asking the parties questions. He reviewed documents presented to him. After asking if either party had anything else to add, he announced that he was taking the case under submission and asked the attorney to prepare a statement of decision and judgment, which the judge later signed. The commission concluded that Judge Boardman, on his own initiative and without notice to or consent by the parties, followed an “alternative order” in a

"misplaced effort to conserve judicial resources." It noted that the parties were denied their rights to present and cross-examine witnesses and to present evidence.

E. What Judges are Protected from: A Self-Represented Litigant Will Not Be Allowed to Contest the Propriety of Judicial Accommodations That He or She Requested

In a criminal case, *People v. Morgan* (1956) 140 Cal.App.2d 796, 296 P.2d 75, the trial court ruled that only the judgment and stay of execution from the court file related to a prior conviction would be admitted into evidence. The defendant then moved to introduce the entire file into evidence. The judge advised him that "there are matters in that file that are very detrimental to you." The defendant nonetheless insisted that the entire file be introduced into evidence. The court did so. On appeal, the defendant claimed that admission of the entire file was reversible error. The Court of Appeal quoted *People v. Clark*:[24]

> But by electing to appear *in propria persona* a defendant cannot secure material advantages denied to other litigants. Certainly one appearing *in propria persona* cannot consent at the trial to the introduction of evidence, after first introducing the subject matter himself, and thus invite the introduction of evidence to rebut the inference he was trying to create, and then be permitted on appeal to complain that his invitation was accepted.

Note that the Court of Appeal did not criticize the judge's advice to the defendant that the file contained information detrimental to his case.

Conclusion

The broad range of discretion granted to California judges in their handling of cases involving self-represented litigants allows them to manage their courtroom in a manner that addresses concerns about procedural as well as substantive justice.

[24] 122 Cal.App.2d 342, 349, 265 P.2d 43.

Chapter 4: Solutions for Evidentiary Challenges

4

Solutions for Evidentiary Challenges

Introduction

A critical component of judging is managing the receipt of evidence. As a practical matter, judges find that they often end up asking evidentiary questions of the parties, establishing the foundational facts for evidence, explaining what is needed for evidence to be admitted, and asking questions designed to clarify the weight to be given to the evidence.

However, judges often feel torn. On the one hand, they feel compelled to make sure that they hear all that they need to hear to decide the case fairly, both in terms of the totality of the evidence and the information about that evidence that lets them decide what weight to give it. On the other hand, they fear putting their hand on one side of the scales of justice as well as being possibly inconsistent with the governing substantive and procedural rules of evidence. California case law is clear that judges may not dispense with the rules of evidence in cases involving self-represented litigants. *Bonnie P. v. Superior Court* (2005) 134 Cal.App.4th 1249, at 1255.

I. Admit Evidence Where Appropriate, Fair, and Consistent With the Law

In these cases, a judge has three core goals:

1. To hear as much as appropriately possible about the case to reach a just and reliable outcome;[25]

2. To do so in a way that is consistent with the law; and

3. To do so in a way that is fair and is seen by the public as fair and as the product of a fair process.

II. Admissibility and Weight

These goals require that the following take place:

1. As much evidence as possible should be heard, provided that evidence is appropriate;

2. Evidence is not appropriate, that is, should not be considered, if it is not reliable, in the sense that it should not be given any weight;[26]

3. Evidence may not also be appropriate, and therefore not considered, because of other policy goals.[27] Generally, receipt of such evidence notwithstanding its being subject to exclusion is less harmful than in circumstances in which

---

[25] This chapter frequently refers to "appropriate" evidence rather than the technical term "admissible" evidence, since it is attempting to provide practical guidance that is consistent with technical requirements and, indeed, to show that commonsense approaches will lead to results that comply with those requirements. (In some cases, as discussed below, evidence may well not be technically "admissible" had there been formal objection, but is not inappropriate or harmful and can be considered without that objection.)

If judges focus on the appropriateness of evidence, they will find that they are not in violation of technical rules governing the overall admission and consideration of evidence. However, while it may be appropriate to consider evidence that in a different procedural context might be excludable, nothing in this benchguide recommends the admission of evidence that would be inadmissible in the procedural context under discussion.

[26] In the relatively rare case of a self-represented litigant trying a case before a jury, evidence should also be excluded if it is prejudicial, in the sense that it will do more harm than good to the fact-finding process, because the jury will be prejudiced by it. If the case is before a judge, the judge is assumed to be able to avoid such prejudice.

[27] California Evidence Code, division 9, *Evidence Affected or Excluded by Extrinsic Policies*, e.g., §§ 1100–1109 (character, habit, and custom); §§ 1115–1128 (mediation); § 1152 (remedial action); § 1153 (offer of compromise); § 1156 (certain hospital research); § 1160 (certain statements of sympathy.)

exclusion relates to reliability (although to admit it over objection would be directly inconsistent with the rules of evidence);[28]

4. The fact-finder needs to have enough information to be able to decide the reliability and weight of each bit of evidence;[29] and

5. The processes must be consistent with the rules of evidence and procedure.

Judges need to find a process that meets these goals and reflects the way we see the legal system as a whole. Creating a special set of rules for self-represented litigant cases would be counterproductive. In the end, public trust and confidence in the legal system depends on decisions in all kinds of cases being made on commonsense grounds that are understandable by laypeople.

III. The Formal General Rules of Evidence

At first glance, it might appear that for a judge to meet the fact-finding goals described above would be difficult, particularly given the complexity of the rules of evidence.

However, as a practical matter, as the detailed analysis below shows, the general rules for the taking of evidence make the task much easier and, in fact, render most of the specific and hypertechnical rules largely irrelevant in day-to-day practice.

---

[28] Such evidence is subject to exclusion for policy rather than reliability reasons. Examples include the rules dealing with prior criminal convictions (Evid. Code, § 1101) and those with subsequent repairs (Evid. Code, § 1152). The failure to exclude such evidence means that the policy underlying the rule of exclusion is undercut, but the core truth-finding goal is not. If the rule is that such evidence is admitted without objection, that represents in part a conclusion that the harm is less great than if the evidence should be excluded regardless of objection. (If only one side has an attorney, there is a residual potential unfairness under this model, in that it allows a judge to permit into evidence in a self-represented litigant case evidence that would be excluded were competent counsel present, or if the self- represented litigant objected. This imbalance is generally not present if neither party has counsel.)

[29] When there are lawyers present, the process of challenge, impeachment, and argument gives the judge the information he or she needs to make this decision. When there are no lawyers, that information must come from a different process.

Moreover, to the extent that the technical rules do constrain judges in self-represented litigant cases, this constraint is usually very much in the direction of commonsense notions governing the weight to be given to the evidence.

A. Evidence Admitted Without Objection

If evidence offered by a self-represented litigant is not objected to, that evidence generally comes in for all purposes.[30] Given that most self-represented litigants do not object, at least in the formal terms that objections require, most evidence is admissible and may be given such weight as the judge deems appropriate. The exceptions to this rule of admission without objection tend not to be technical rules but to deal with individual instances of very limited and obvious areas of highly prejudicial evidence.

B. Much Evidence Is Self-Admitting

Many forms of narrative testimony contain the foundation for their own admissibility, even if objected to. Many hearsay narratives, for example, contain a description of the circumstances from which the judge can determine that they meet foundational requirements. Some statements are clearly from their own context or content against interest,[31] or of family history.[32] Others are statements of mental or physical state,[33] or are business records.[34]

Similarly, many documents when offered as part of a narrative will meet foundational requirements, even if challenged or deemed challenged.

---

[30] Evid. Code, § 353 ("A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"); *People v. Alexander* (1963) 212 CA 2d 84, 98 (hearsay); *Powers v. Board of Public Works* (1932) 216 C 546, 552; Witkin, Cal. Evidence (4th ed., vol. 3), (2000) §§ 393, 394 and cases cited.

[31] Evid. Code, § 1230.

[32] Evid. Code, §§ 1310–1316.

[33] Evid. Code, §§ 1250–1253.

[34] Evid. Code, §§ 1270–1272.

C. A Judge Can Make Material Objection

The fact that evidence is not objected to does not mean that the judge has to admit it.

The judge is free to choose to act as if an objection had been made.[35]

D. Foundational Weight and Admissibility of Evidence

The judge can find out all that needs to be found out both in terms of the formal admissibility of the evidence and the weight to be given that evidence if admitted.[30]

There is nothing nonneutral, or any prohibition in the rules, in the judge's determining whether evidence offered is admissible, or in the judge exploring what weight to give it.

E. Weight and Credibility Are for the Fact-Finder

Unless clearly barred, most evidence is admissible in these circumstances.[36] Moreover, weight and credibility are for the fact-finder, which in self-represented litigant cases is usually the judge.

F. On Appeal, Judges Are Generally Assumed to Have Known and Correctly Followed the Law

In an appeal, the burden is on the appellant to show that the trial judge was in error, and the burden is on the losing party to make sure that the record shows that error.

---

[35] Witkin, *supra*, § 393 (exclusion on judge's own motion of questions or underlying matter); *Davey v. Southern Pacific Co*. (1897) 116 CA 325, 330, 48 P 117; *Kimic v. San Jose–Los Gatos Interurban Ry Co* (1909) 156 CA 379, 390.

[36] Evid. Code, § 350 ("No evidence is admissible except relevant evidence."); § 351 ("Except as otherwise provided by statute, all relevant evidence is admissible."); § 210 ("'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"); *Jefferson's California Benchbook* (3rd ed., 1997) vol. 1, p. 298, § 21.16; *People v. Hill* (1992) 3 CA 4th 959, 987.

For example, if evidence is admissible only for a limited purpose, the judge will be assumed to know this, and to have followed the rule, even if there was a general objection to the evidence. In other words, a judge will not be found to be in error for failing to exclude such evidence, provided it can be admitted for some purpose.

IV. These Principles Give Judges Great Discretion

Generally, it is totally proper for judges to find out all they need to about the evidence that is offered, to then admit it or not admit it, and to give it the weight they feel it deserves.

Conclusion

The rules of evidence therefore provide no barrier to judges using their discretion to obtaining, considering, and giving appropriate weight to the evidence they need to hear to decide cases fairly and completely.

Chapter 6 and the appendix to this benchguide provide examples of specific “scripts” that may help achieve these goals in particular situations.

Chapter 5: Caseflow Management

5

Caseflow Management

Introduction

Effective caseflow management for cases involving self-represented litigants requires that judges work proactively as members of a larger court system. The complexity of self-represented jurisprudence demands careful attention to the interdependence of the different parts of court operations. It requires thought about how to best protect the rights of all litigants regardless of whether they have attorneys.

I. Caseflow Management Depends on Effective Systems

The roles of file clerks, data input, records management, information systems and technology, court operations, supervision, management and administration, court investigation, mediation, research attorneys, self-help attorneys, and paralegal staff affect how well a courtroom operates. For example, calendar management starts for the self-represented litigant at the clerk's window when papers are first filed. Litigants who have been treated courteously and helpfully by the court staff are far less fearful and angry when they arrive for their court hearings. This holds true for each encounter litigants have with court staff prior to their hearing, whether with clerks, mediators, or self-help center attorneys.

The way in which each component of court operations works is also critical to the effective management of the judge's calendar. For example, decisions about filing, records management, calendaring systems, information systems, and data collection can have serious consequences on the daily operation of the courtroom, and input from

judges and courtroom staff must be incorporated throughout the development of such systems.

Some examples of the types of systemic caseflow management issues important for judges to consider are the following:

1. Court-based assistance for self-represented litigants;

2. Calendar management;

3. Docket control;

4. Reduction of unnecessary continuances;

5. Facilities and technology;

6. Staffing;

7. Continuing education;

8. Creating opportunities for early comprehensive dispute resolution;

9. Creating procedural uniformity throughout the court; and

10. Developing mechanisms to serve litigants needing an interpreter or accommodations to deal with disabilities.

Judges should not shy away from participation in regular meetings with their own court staff and with staff from other court operations. Judges and staff should meet regularly, become familiar with each other's roles and how they interact, develop an ability to solve problems as they arise, and strategize to improve efficiency. Staff from different departments meet in various combinations to address specific needs at specific times, but the goal is to maintain good lines of communication within the system as a whole. When meetings within the court system are run well, they can significantly improve a judge's ability to manage a calendar with self-represented litigants in the most effective way possible.

It is often extremely helpful to meet regularly with self-help attorneys and others providing assistance to self-represented litigants to identify issues that may not be raised in bench-bar and other meetings. It is

also helpful to set up a system of communication with legal services and other agencies who frequent the court or whose client population appears often. For example, a domestic violence clinic may have input about how existing systems are affecting their clients and have ideas for improvement. Community-based providers, especially in immigrant communities, may have valuable feedback from their clients about barriers.

II. Assistance to Self-Represented Litigants

One principal problem for both the court and the self-represented litigant is the litigant's unfamiliarity with the court's procedures for setting hearings and otherwise moving cases from filing to resolution. Many litigants assume that the court will schedule all necessary hearings and inform them of what they need to do at each. In fact, court rules often require the litigant to take the initiative to move a case forward.

California courts have found that providing information and education to self-represented litigants benefits both the public and the courts. This has been addressed in several ways:

1. **Family Law Facilitator Program.** This program provides for an attorney in each of California's 58 counties to provide information and education to self-represented litigants in Title IV-D cases on issues of child support and health insurance. Many courts have provided additional funding for these programs so that assistance is available for a wide array of family law matters including child custody, visitation, dissolution, and domestic violence.

2. **Self-Help Centers.** Other court-based self-help centers have been implemented to provide assistance to self-represented litigants in family law as well as in probate matters such as guardianship, conservatorship, and small estates and other areas of civil litigation including landlord/tenant, civil harassment, consumer issues, and small claims. Some provide assistance with traffic matters and expungement of criminal records.

3. **The California Courts Online Self-Help Center**. This Web site (www.courtinfo.ca.gov/selfhelp) provides a great deal of information for litigants able and willing to go online to access it. The entire site has also been translated into

Spanish (www.sucorte.ca.gov). Courts often publish their local rules, forms and additional information on their court Web site.

4. **Pamphlets and Checklists.** Most courts find it necessary to supplement the electronic information with printed pamphlets or checklists available at the courthouse (typically in the self-help center or facilitator's office). Some courts go further, actually handing summary information packets, or letters from the presiding or supervising judge, to litigants at the time of filing of every new complaint or petition.[37]

A typical checklist might include information about the following:

1. Service of process;

2. Filing an answer or response;

3. Alternative dispute resolution processes available;

4. Disclosure requirements and discovery options;

5. Obtaining a default judgment;

6. Filing motions;

7. Requesting hearing or trial settings; and

8. Special requirements for particular case types, such as mandatory parenting courses and mandatory mediation of contested child custody and visitation matters.

Some courts require the plaintiff or petitioner to provide a copy of the packet or checklist to the opposing party as part of the service of process.

[37] For examples of materials developed by local courts see the AOC's Equal Access Program's compilation of instructional materials from the courts at http://www.courtinfo.ca.gov/programs/equalaccess/instmat.htm.

III. Calendar Management

A. The Court Should Determine the Pace

Courts have found that, even with explicit instructions on the need to request a court hearing and how to do so, many or even most self-represented litigants fail to schedule the hearings needed to complete their cases. Consequently, many courts have found that it is much more effective to schedule the hearings themselves. For example, a status conference or case classification conference in all marriage dissolution cases is set a certain number of days (usually 90, 120, 150, or 180) after the filing of the petition. The court provides notice of the hearing to all parties and, on the date of the hearing, determines what progress has been made, makes whatever rulings are possible, decides what further steps will be needed, and schedules those steps with the parties.[38]

As part of this process, the court provides detailed instructions to the parties about the specific tasks they must perform prior to the next hearing. At the close of every hearing, the court sets the date of the next hearing, if necessary, and gives the parties a written notice of the date, time, and purpose of the hearing.

Many courts have also found it effective to assume responsibility for preparing orders and judgments in cases in which both parties are self-represented. In many instances they are prepared in the courtroom by courtroom clerks, based on the judge's directions. In other instances, orders and judgments are prepared by family law facilitators, self-help center staff, pro bono lawyers, or community volunteers.

B. Controlling Calendar Size

Docket size in calendars with large numbers of self-represented litigants should be restricted to a reasonable number of matters, allowing litigants the time and opportunity to present their cases to the judge. Calendars in departments with high numbers of self-represented litigants tend to be too crowded. A careful workload analysis should be conducted to determine the actual workload for courtrooms handling such cases and to set a reasonable cap on the size of the dockets. This

[38] For examples of these materials see the AOC's Equal Access Program's compilation of family law caseflow management materials from the courts at http://www.courtinfo.ca.gov/programs/equalaccess/family.htm.

should also recognize the amount of additional time required when an interpreter is needed for one party, and even more when both parties require an interpreter.

Setting a cap should not lead to longer waiting times for hearings but point to the need for additional judicial resources for the self-represented workload. While effective case management techniques such as the use of a differentiated calendar system (as discussed below) can help with efficiency and reduce stress on judges and courtroom personnel, an evaluation of reasonable workload levels and appropriate allocation of judicial and other resources is critical. Inequitable distribution of workload among judges leads to high levels of stress in certain assignments and characterization of those assignments as undesirable and of low status in the judicial hierarchy.

C. Effective Calendaring—Specialized Calendars

Organizing calendar settings so that like matters are heard together can improve efficiency because it allows focusing of resources and more accurate estimating of time needed.

This form of calendar organization makes it much easier to establish appropriate calendar size according to the issues to be heard, and it can reduce the stress on judges by making each calendar more predictable. This calendar strategy clusters cases with similar or limited issues together for hearings.

1. Self-represented litigant calendars;
2. Traffic calendars clustered by type of ticket and fine;
3. Default calendar;
4. Domestic violence hearings with child-related issues;
5. Domestic violence hearings without children involved;
6. Motions related to custody/visitation only;
7. Motions with child support issues only;
8. Law and motion calendars for jurisdictional and other matters; and
9. Review hearings.

By setting similar cases together, the court can make efficient use of staff and community volunteers. For example, in a family law court, if a judge sets all reviews of supervised visitation on a specific afternoon, the supervised visitation provider(s) can be available at that time to help get new parents signed up who had not previously been able to

accomplish this task. Clustering the cases in this way maximizes the availability of this particular community provider to both the court and the litigants.

Self-Represented Litigant Calendars. Many judges have found that both the court and the litigants benefit from calendars devoted exclusively to cases that do not involve lawyers. The most important benefit is the ability to assemble staff and volunteer support for these calendars. A second major benefit is eliminating the stress of calendars with both represented and unrepresented cases.

Courts with self-represented litigant calendars differ in their categorization of cases involving one represented and one unrepresented litigant. Some judges prefer to treat them together with cases with both sides unrepresented, finding that the self-represented litigants in these cases often benefit from the resources assembled for those calendars and from the general instructions for all self-represented litigants at the beginning of the calendar as well as learning from watching others on the calendar ahead of them. Others prefer to include them on calendars in which lawyers represent both sides.

When calendars contain both represented and self-represented cases, some judges call the self-represented cases first, as their matters often take less time and attorneys can be working to settle cases. Others call attorney cases first in an effort to minimize the time spent by lawyers waiting in the courtroom, and hence the cost of their services to their clients. Some judges will call cases with "model" attorneys as a way to help educate litigants about the court process and appropriate behaviors.

D. Minimizing the Number of Appearances in Each Case—Reducing Unnecessary Continuances

The court has a strong interest in holding to the appropriate minimum the number of court appearances in each case; this is true for cases involving represented as well as unrepresented litigants. The fewer the number of hearings, the less time required of judges, courtroom staff, and clerk's office clerical staff in scheduling, pulling files for, conducting, and preparing minute orders for those hearings.

Self-represented litigants share the same interest: the fewer the number of hearings, the fewer appointments they need to keep track

of, the fewer days of work they miss, the fewer child care arrangements they need to make and pay for, the fewer trips they must make to the courthouse, and the less anxiety they experience. One of the strongest incentives for self-represented litigants to reach agreement on contested issues is the opportunity to resolve the case and avoid having to come to court again.

Many courts therefore attempt to resolve cases involving self-represented litigants on their first day in court. The court staff and volunteers assist the litigants to settle their cases and to prepare whatever paperwork is needed to present the matter for resolution by a judicial officer.

Judges report that court-based self-help assistance to self-represented litigants saves valuable courtroom time and reduces the number of continuances because of procedural defects.[39] Assistance results in the litigants and the court having the following:

1. Complete and accurate paperwork;

2. Adequate supporting documentation;

3. Knowledge of the kind of information the judge needs to hear; and

4. Greater ability to focus on relevant issues during the hearing.

E. Marshaling Court and Community Resources

To make the best use of the judge's time on the bench, courts assemble teams of court staff and volunteers from agencies and community organizations to assist litigants with reviewing paperwork, resolving issues, and preparing documents to dispose of cases. Examples of the sorts of resources brought to bear include the following:

1. Self-help center staff;

[39] Judicial Council of California/Administrative Office of the Court, *A Report to the California Legislature: Family Law Information Centers: An Evaluation of Three Pilot Programs* (March 1, 2003).

2. Family court facilitator(s);

3. Family court services mediators prepared to conduct “same day” or emergency mediation sessions;

4. Clerk’s office staff;

5. Legal services attorneys and staff;

6. Volunteer attorneys;

7. Volunteer private mediators;

8. Volunteer forensic accountants;

9. Law professors and volunteer law students from a local law school clinic;

10. Court interpreter(s);

11. Student interpreters from a local university interpreter certification program;

12. High school and college student volunteers;

13. Community volunteers (including retired persons);

14. Parental abduction attorneys;

15. Domestic violence restraining order advocate(s);

16. Drug treatment program staff;

17. Domestic violence program staff;

18. Supervised visitation program staff;

19. Guardianship clinic staff; and

20. Child Protective Services liaisons.

The court uses these resources to assess the case’s status; provide information on needed paperwork; help prepare missing, incomplete, or incorrect documents; conduct settlement negotiations with the

parties; and write up agreements for presentation in court. Some judges ask some of their staff to be present in the courtroom for calendars involving large numbers of self-represented litigants.

The following report from a family law judge in a small county underscores the importance of adequate resource support.

> I have found that now that I have enough people helping me in the family law department, I really don't have any serious case management issues.
>
> We have the following people who either are in court or will immediately respond: two clerks, a parental abduction attorney, two mediators, the facilitator, the domestic violence restraining order advocates, and a court staff member who acts as a resource specialist and handles any orders or filings that are not taken care of by the domestic violence advocates or the facilitator.
>
> We have further help in managing the pro per litigants from the Domestic Violence Clinic attorneys from the law school, Unified Family Court therapists, the Family Court Children's Fund, the family resource center for supervised visitation, a volunteer panel of experienced family law attorneys for settlement conferences, a CPS immediate response contact, and the Guardianship Clinic. We also have the Unified Family Court manager and the Unified Family Court clerks who prepare the Yellow File so that we know all the facts about the parties present in court.

This direct assistance can also be extremely rewarding to the volunteers who participate in these calendars, as they are time-limited, discrete services with the opportunity to see immediate benefits.

> Volunteer work for the court balances what we do as professionals in our private practices and brings more than a modicum of satisfaction. There is nothing more gratifying than unknotting a technical question that allows a pro per litigant to get the dissolution done there and then. This contrasts with the complicated legal issues and complicated legal personalities that we have to grapple with day in and day out in our private practices. I would do it every month for the court if it were possible. It keeps me sane!
>
> —Pro bono attorney on self-represented litigant calendar

IV. Facilities and Technology

A. Courtroom Facilities

A courtroom should be able to comfortably hold all the litigants who appear for hearing on the calendar. Litigants forced to wait in the hallway may not hear their case called and may thus miss their hearing. They will also not have the benefit of "seeing how it is done" and learning from observing others. Overcrowding detracts from the public's sense that the court is concerned about litigants' legal rights. It also tends to increase whatever anxiety levels already exist among the litigants, who are now crowded and uncomfortable in addition to being nervous about their cases.

If the litigants cannot fit into the courtroom, the judge should bring this fact to the attention of the court executive officer immediately.

Moreover, an effective self-represented litigant courtroom operation requires additional courthouse space. If courtroom support staff such as self-help attorneys, mediators, or volunteers are available to provide assistance, there must be some place for them to work with the litigants other than in the hallways, waiting areas, or stairwells. Some courts have constructed as many as a dozen small conference rooms immediately adjacent to the courtroom for day-of-appearance assistance meetings between litigants and resource persons.

B. Technology

Courtroom Technology. Courts need access to good technology in order to operate well. For example, a courtroom should have access to any electronic data system available and case registry or case management systems.

Any given calendar can be adversely affected by the breakdown or lack of necessary technology in a courtroom. Staff preparing orders after hearings must have easy access to computers and copy machines. Staff running guideline child support calculations during settlement discussions with litigants must have access to computers and printers. Providing staff with appropriate Internet access to legal information, and to court data needed to ascertain the status of cases, or to identify related cases, is critical. Lack of simple, effective technology will seriously impede the courtroom's efficiency.

Beyond the Courtroom. Courts have taken advantage of automation in many creative ways, including the following:[40]

1. Informational Web sites to provide full access to procedural information.

2. The EZLegalFile system developed in San Mateo County and now used in 38 courts to enable self-represented litigants to create court forms online and print them for filing or presentation in court. "Hot Docs" software is being used by the AOC to provide courts with their own forms assembly programs.

3. Word-processing macros for completing standard court orders and judgments.

4. Using share drives on which Family Court Services staff post draft parenting plans so that they are available to the judge electronically in the event changes are needed in the plan following a hearing.

[40] See examples of these resources at the AOC's Equal Access Program Web site: http://www.courtinfo.ca.gov/programs/equalaccess/techres.htm.

V. Staffing Issues

Caseflow management is made more efficient by thoughtful consideration of the training and qualities most beneficial for court staff working most closely with self-represented litigants.

A. Self-Help Assistance in the Courtroom

Providing this assistance requires significant advance planning, including the following:

1. Organization of the staff and volunteers to ensure that adequate personnel are present, that they have clear expectations concerning their roles, sufficient training to perform them competently, and are appropriately supervised by qualified attorneys;

2. Development of procedures for self-represented litigant assistance in cases without a lawyer on either side, including triaging processes for determining what assistance is needed and appropriate and when to refer litigants into the courtroom because further staff effort is not warranted;

3. Developing procedures for handling litigants who need interpreter services or additional assistance;

4. Refinement of those processes for cases involving one represented and one unrepresented litigant;

5. Development of checklists and fillable forms for the use of litigants and resource people in the assistance process;

6. Development of a process for litigants to check in, to be assigned to a staff person or volunteer, and to be taken to a physical location where they can work on their case with relative privacy and access to needed computers;

7. Development of a process for referring cases to the courtroom when they are ready for bench officer review or when staff are unable to help the self-represented party or parties to advance their cases; and

8. Development of a process for referring cases from the courtroom back to the resource staff for posthearing consultation and document preparation.

> It is wonderful to work collaboratively with the courts and the private bar to develop a system that provides self-represented litigants real assistance to finalize their divorce or paternity cases. Most of these persons do not need to hire lawyers but are overwhelmed by the legal forms and procedures. I feel immensely satisfied that we are helping these people move on with their lives while giving them a positive look at the court system.
>
> —Pro bono attorney volunteer

There needs to be a clear understanding of the critical necessity for the court to be neutral, thus providing assistance to all litigants and maintaining the appearance of neutrality in all matters.

B. Court Staff

Formal education and training programs for court staff should be established if not already in place, and reviewed if existent for possible expansion. As clerks, both at the filing window and in the courtroom, are asked to give self-represented litigants more information, they should be provided with increased education to expand their base of legal information.

The demeanor of the courtroom clerk, bailiff/court attendant, court reporter, and supporting staff and volunteers is important to the impressions that self-represented litigants receive of the court. The judge should make it clear to these individuals that they are expected to treat litigants with dignity and respect. Joking between judges, clerks, and, indeed, any staff about the litigants during breaks or at other times should be discouraged. Staff joking or being familiar with attorneys may create the impression that they have an inside track or access to the court that the self-represented litigant lacks. Such conduct contributes to a culture of discourtesy and all too easily escalates to the level of an impermissible ex parte communication. Just as the staff rightfully expects that the judge will protect them from

abusive behavior by the public, so do the litigants have a right to expect respectful treatment from the judge's staff.

Of equal importance is the ability of the staff to set boundaries with the litigants, and to do so without being rude or dismissive. If a courtroom clerk is rude to litigants, for example, before the judge takes the bench, a judge will encounter an unnecessarily hostile courtroom environment that he or she must then overcome during the proceedings.

Courtrooms with large numbers of self-represented litigants benefit from experienced staff confident in their skills. Patience and a sense of humor are also genuinely helpful.

VI. Judicial Education

One way to assist judges in feeling comfortable and being effective in the courtroom is to provide appropriate judicial education. Knowledge of the law relevant to their assignment is absolutely critical for judges in assignments with high percentages of self-represented litigants. Without attorneys to brief or present the legal issues, judges must be aware of applicable legal arguments and do their own research. In many cases, departments with large numbers of self-represented litigants have heavy dockets and do not have research attorney resources allocated to them. It is up to the judge not just to know the law but to be able to apply it quickly and accurately.

Previous subject matter experience on the bench or in law practice is an enormous benefit for a judge handling cases with self-represented litigants, but assigning a judge with prior expertise is not always possible. Some ways to provide support for judges include mentor judges, both official and unofficial.

A. Mentor Judges

Official mentors. To help new judges adjust to their roles as judicial officers, many courts provide them with official mentor judges. Certainly, part of that mentoring should include assistance with referrals to educational resources in the subject area of a new judge's assignment—particularly when it requires working with large numbers of self-represented litigants.

Unofficial mentors. It is also highly beneficial for judges to have their own unofficial mentor judges who are simply colleagues they know and trust to provide them with good counsel on various professional topics. Talking with a judge who previously held the assignment or a colleague currently handling the same types of cases in another department, or even in a similar-sized county, can help relieve isolation and increase subject matter expertise.

Lists of expert judges. As part of a regular bench orientation, some courts have published a list of areas of expertise of the members of the bench so that a new judge may call on a colleague with specialized knowledge.

B. Court-Employed Attorneys

Research attorneys. Research attorneys are an excellent resource for judges in assignments with high percentages of self-represented litigants. This is a rational allocation of resources, given the size of the dockets in many of these departments.

C. Continuing Education

In addition to new judges orientation, California, as do most states, provides continuing education for judges. Continuing education is particularly important because it addresses more complex substantive law matters. Continuing education for the bar programs can be very helpful, as are national programs such as those given by the National Judicial College or the National Council of Juvenile and Family Court Judges. Conferences and nonjudicial meetings held by associations of professionals affiliated with the court often welcome participation by judicial officers who wish to develop expertise.

Many judges find online resources including benchguides and online classes extremely helpful. They can easily get access to the materials and often can find critical resources quickly. The National Center for State Courts has compiled a list of online judicial education resources at http://www.ncsconline.org/WC/FAQs/JudEduFAQ.htm.

Conclusion

Integrating caseflow management for the self-represented with the court's overall strategy and approach yields great dividends for the courts, for the self-represented, for those with lawyers, and for lawyers themselves, since it helps guarantee that the court's time is used effectively and that public trust and confidence is maximized.

Chapter 6: Courtroom and Hearing Management

6

Courtroom and Hearing Management

Introduction

The courtroom and hearing are the focus of the whole system. The ultimate test of the success of all of the insights and techniques in this benchguide is whether the self-represented litigant in fact obtains access to justice.

While self-help programs, information, and assistance can be extremely helpful, in the final analysis it is the quality of the process in the courtroom itself that most determines the quality of access that the litigant receives.

I. Preparation for Hearings

Cases involving self-represented litigants benefit from prehearing preparation—both by the judge's staff and by the judge personally.

A. File Review

Prehearing review of case files greatly facilitates the efficient and effective flow of cases through the calendar. File reviews, however, can also waste a judge's time when the cases reviewed do not proceed to hearing as initially scheduled. The use of support staff to assess files for readiness (see the next section on staff-conducted readiness reviews) a day or two before scheduled hearings can save significant judicial time. Even when support staff are unavailable to perform this task, a judge can prioritize which files to review in the greatest detail according to a readiness review strategy.

For example, when it is clear from the pleadings that a case is unlikely to proceed at the time of the hearing, it might not make sense to spend time reading the file in detail. Conversely, if the pleadings appear to be appropriate, and there is a valid proof of service in the file, reading the file seems potentially more useful. Further, if responsive papers have been submitted and there appears to be a good chance of a contested hearing, taking the time for a careful file review would be clearly advisable. The major benefit of readiness assessments is to triage cases for judges to identify which ones require the most preparation, which have outstanding threshold issues that must be dealt with before any hearing can go forward, and which have issues of a type that cause particular concern.

B. Staff-Conducted Readiness Reviews

If possible, staff attorneys or other appropriately trained court staff should review the files and identify a variety of procedural issues for the judge. Checklists are good tools for this.[41] Identifying cases that are unlikely to proceed can save the judge time in his or her own file review and provide guidance for organizing the calendar.

Determining whether cases are ready to proceed will always take place to some extent at the time of the hearing; however, when files have been assessed for readiness prior to hearing so that the judge can begin with good information about the status of pleadings and service for each case on the calendar, disposition of procedural matters is expedited and time for hearings is increased.

Below are some examples of issues that, if identified through a readiness review, can be handled either prior to the hearing date or quickly at the beginning of a calendar, without investing significant court or litigant time.

1. No Proof of Service. Cases in which there is no proof of service, or a defective proof of service, can be identified. As a general case management rule, cases in which there are no proofs of service may be those in which neither party appears for hearing, but this is often not true in cases involving self-represented litigants. These litigants often don't know how to file a proof of service that they have in fact obtained, prior to the hearing, or are unaware

[41] Examples of checklists are included in the appendix to this benchguide.

of the need to file it in advance. If a proof of service is produced at the hearing, or both parties appear, the matter can proceed; thus, it is wise to review the file prior to the hearing if possible.

2. Pleading Defects. Cases in which there are defects in the pleadings sufficient to prevent a hearing can be identified and brought to the judge's attention. For example, a litigant may have filed a request for relief on the wrong pleading forms, brought the action against an improper party, asked for relief on a matter over which the court has no subject matter jurisdiction within the case at hand, or asked for a decision on a contested trial issue by filing a pretrial motion.

When such issues are identified through a readiness review, a judge can begin the calendar by referring the litigants to the self-help attorney to educate and assist them. In this way the hearing date will not be a waste of time for the court or the parties. Alternatively, if no self-help attorney is available, the judge might call the case at the beginning of the calendar to explain the problem to the litigants rather than make them wait for a long time in the courtroom only to hear that their case will not go forward.

Other procedural problems. Other procedural problems can be identified by readiness reviews. For example, required documentation such as proof of income, proof of completion of a previously court-ordered service, or failure to complete a prehearing requirement such as mandated child custody mediation may be missing. A judge may find that referral to the self-help attorney can solve the problem sufficiently to proceed with the hearing and avoid the need for a continuance. If a continuance is required to allow litigants to produce additional documentation or attend mediation, the case can be called at the beginning of the calendar and handled without the need to keep the parties sitting in the courtroom. It may also be possible for the parties to obtain the needed information from their homes or offices and return to court for the afternoon calendar.

Readiness reviews can also flag particular issues to which the judge may want to pay particular attention and obtain more information before the hearing. The following are examples of such issues:

1. Evidence of an active juvenile dependency case;
2. Possible jurisdictional issues;

3. Evidence of a venue issue;
4. Temporary restraining order set to expire according to its own terms on the day of the hearing;
5. Existence of other cases with potentially conflicting orders;
6. Related cases that might be consolidated sua sponte by the court; and
7. Indication that one or both parties may not be English speakers.

Preparing file cover sheets. For the cases that appear ready for hearing, it is helpful to have certain basic information at hand to avoid having to go back through the file to find the information. This information might be put on a form template attached to the front of the file or put onto the judge's copy of the calendar. The following are examples of basic facts that might be included on file cover sheets:

1. Names of the parties (with phonetic pronunciation);
2. Language or other special needs;
3. Names of children and their ages;
4. Case type (family law, juvenile, guardianship, domestic violence);
5. List of issues for hearing;
6. List of documents relating to the issues set for hearing;
7. Need for interpreter (or other type of accommodation);
8. Whether responsive papers have been filed;
9. Case status—next step to disposition; and
10. Traffic—code section cited and fine.

Tabbing important documents in the file. Tabbing, color coding, or otherwise identifying important documents in a case file can prove helpful during a hearing. This is particularly so in cases with large files or with motions consisting of multiple forms and supporting documents.

II. Check-In Procedure

Noticing litigants to appear 15 to 30 minutes before the judge is to take the bench gives them time to check in with the clerk or bailiff.

It is important to inform the parties in the hearing of the requirement for "early check-in" so that they do not get the impression that the judge is late in taking the bench.

The check-in will ensure that the judge has the most accurate information about who is present for hearings. For example, if no one responds to the judge during the roll call, yet someone has checked in with court staff, a question is raised, and the matter should not be dropped from the calendar without further inquiry. Conversely, if no one responds during roll call, and no one has checked in, the case can be dropped after a reasonable waiting period.

The check-in also allows court staff an opportunity to gather updated information about such things as service of process on cases where questions have been flagged, to provide information to litigants about such matters as mediation reports and recommendations in family law matters, and to provide an opportunity for exchanging any documents requiring pretrial disclosure. It allows staff the opportunity to ascertain whether any of the litigants may be requiring an interpreter. If one is available, staff can call for him or her.

The check-in time also offers an opportunity for the self-represented litigant to ask basic questions of the clerk without interrupting the court. Coming into a courtroom with the judge already present is intimidating, and this check-in time allows litigants to become more comfortable with the courtroom and somewhat calmer when it is their turn to present their case.

The check-in process may actually lead to more extensive intervention if the court has organized a prehearing assistance program for self-represented litigants as described in chapter 5.

III. Setting the Tone of the Courtroom

The judge can set the courtroom's tone as he or she enters and sits down at the bench. The more relaxed and at ease the judge, the more relaxed and at ease will be the general tone in the courtroom. That is not to say that some circumstance might not change this dynamic; however, the judge's power to influence the courtroom's emotional tone on entering should not be underestimated. As a consequence, the more well-prepared a judge feels, and the more confidence that he or she will be well supported by staff inside the courtroom, the more likely the judge's entrance will be calm, self-assured, and friendly. A judge who can enter the courtroom in a relaxed manner, greet the staff while also acknowledging the presence of the audience, take sufficient time to get seated and comfortably organized at the bench,

and appear genuinely friendly and in charge contributes greatly to the general calm and "comfortableness" of a courtroom.

Immediately on taking the bench, a judge may want to briefly greet the audience in the courtroom as well by saying "Good morning" or "Good afternoon." A judge may wish to follow by introducing himself or herself and setting out what will be going on in the courtroom that day.

> I explain when I first come out that everyone will get a chance to talk to me. When people are well mannered, direct, and polite, I am sure to thank them for such behavior so that the crowd can hear.
>
> —Judge

If the litigants are primarily self-represented, many judges find that scripts explaining how the court works are useful. In some cases, local or state statute may require some scripts, such as at the beginning of traffic arraignment calendars. While this sort of information can be provided in writing or by video, personal communication from a judge is often far more effective for self-represented litigants. If a video or written document is used, the judge may want to provide a brief introduction so that litigants will pay more attention to the information. Scripts should be as brief as possible, describe how the courtroom will work, and set forth what is expected of the litigants. The script's purpose is to familiarize litigants with the courtroom process and formal legal tenets so that the calendar can run smoothly, and the parties can proceed with less anxiety.[42]

If interpreters are not available at the time that the judge reviews the script, the judge may want to review some of the key points before a hearing with a non-English-speaking litigant if an interpreter is available at that time. The judge may also want to develop a handout with highlights of the speech in English and other languages frequently spoken in the community that the clerk can hand out at check-in.

IV. Roll Calls

It is usually ineffective to simply call cases up for hearing in the order they appear on the calendar. The judge should obtain the information needed to categorize the cases, to identify and dispose of the matters

[42] Sample scripts are included in the appendix to this benchguide.

that need to be referred elsewhere, to allow counsel—especially pro bono attorneys—with other obligations to attend to them, and to identify the matters that can be resolved quickly. Failure to obtain this information can easily lead to frustrating delays for litigants who are not in serious disagreement or result in stressful time pressures for the judges at the end of the calendars when faced with heavily contested matters yet to be heard.

Beginning the calendar with a simple roll call can help organize the cases effectively. It gives everyone in the courtroom time to settle down and become somewhat accustomed to the surroundings. The judge can start by explaining that he or she is simply going to go down the list of cases that are set for hearing that morning (or afternoon) to see who is present and get an idea of how best to organize the day. The judge should explain (1) that the order of cases will not necessarily determine which case will be heard first, (2) why there are calendars with different times (many courts create differentiated calendars by labeling one as 9:00 and another as 9:01), and (3) that cases on the later calendar may be called before cases on the earlier calendar.

The litigants might be asked to stand when they hear their case called and to make their presence known to the judge. The judge would acknowledge them as they are called and let them know that they need not come forward but that their case will be handled later, after the roll call is completed. Given the complexities of pronunciation, judges should not feel awkward about apologizing for mispronunciation or other challenges in calling the cases. Sometimes it is even difficult to know the gender of the litigants. A gracious apology goes a long way in case of error. At the end of the roll call, the judge may want to ask anyone present whose name hasn't been called to either identify themselves or check-in with the clerk to determine if the litigant is in the wrong courtroom, if there is a difficulty with the schedule, or if the litigant did not recognize when his or her name was called.

During the roll call, the judge can also ask whether the litigants have reached any sort of agreements about their cases. Since self-represented litigants usually don't know how to prepare a stipulation, many come to court even if they are in basic agreement.

As the roll call proceeds, cases tend to organize themselves for the calendar into the following groupings:

1. Cases that will not go forward;
2. Referrals to courtroom support staff;
3. Cases ready for quick disposition; and
4. Cases requiring hearings.

The judge can mark his or her own notes during the roll call to keep track of the status of each case as the calendar progresses.

V. Organizing the Cases on a Calendar

Some cases can usually be handled quickly during the roll call.

A. Dropping Cases—No Appearance

Judges should consider allowing a reasonable time (from the time the parties were noticed to appear) before dropping cases from the calendar. If the litigants have been noticed to appear for a clerk's check-in 15 to 30 minutes before the judge begins the roll call, then it may be reasonable to drop cases at the end of the roll call. Otherwise it is best to wait until after some other court business has been conducted, thereby giving the litigants a short window in which to appear. Judges should be as flexible with self-represented litigants as they are with attorneys who are given latitude because they have matters in other courts or courtrooms that keep them from being present at the beginning of a calendar or when their cases are called.

Allowances should be made for the fact that self-represented litigants are generally not regular visitors at the court and often are confused about where to go and how to find the appointed courtroom. Problems with signage and lack of awareness of issues like security lines to which attorneys and court staff have grown accustomed often present time-consuming barriers for litigants as they navigate their way to the appointed courtroom.

I went to the courthouse where I filed my papers, but the judge I was supposed to see wasn't there. They had an information booth, but the person there couldn't tell me where to go. At least he said it might be across the street. Now, I'm really late. I go out of the building, and there are a bunch of buildings "across the street." None of them have signs saying they're a court. One of them said it was a county building, so I went in there and asked. At least the security person could tell me that there were courtrooms on the third floor. I went up to the third floor and read the sign, but I couldn't find the room they were talking about because it was behind another set of doors and there weren't any markings there. By the time I finally got to the courtroom, my heart was pounding and I was totally stressed. I really thought about forgetting the whole thing and just going home.

—Self-represented litigant

B. Moving Party Appears—No Valid Service

If there has been a prehearing readiness assessment, this case may have been handled prior to hearing. If not, the moving party may claim to have left a proof of service at home. If so, and if time and distance permits, then the person might be able to go home and bring the proof back to the court; in these instances the judge should warn the litigant that the case will be dropped at the end of the calendar if he or she has not returned by then. The moving party more likely will assert that they were unable to serve the responding party, and a new court date will be required. The judge can refer the party to supporting staff and volunteer resources for help with understanding service alternatives, or the judge can engage the parties individually, or in a group, in such a discussion.

C. Continuance Required

Continuances might be required for various reasons. In courts where mediation for child custody is mandated, for example, the required mediation may not have been completed prior to hearing. Financial documentation necessary to make guideline child support orders may be missing.

Many judges find it helpful to provide blank forms that litigants may need such as orders after hearing, income and expense declarations, and declaration forms so that the litigant can complete those forms and be heard later in the calendar. Others have handouts on how to accomplish service or the next steps in the type of proceeding being heard so that the litigants have the information necessary to make the next hearing more productive.

VI. Referrals to Court and Volunteer Support Staff

Whenever a judge makes a referral, unless the person to whom the referral is made is present in the courtroom, the judge should make use of a referral slip detailing the reason for the referral. This is of enormous help to the person to whom the referral is made because the self-represented litigant can completely misunderstand or fail to be able to articulate the reason for the referral.

A. Courtroom Self-Help Attorneys

Using court-based self-help attorneys throughout the court process—and in all types of cases (not just IV-D child support matters)—has proven to be an optimal approach for California trial courts. Use of these attorneys to help manage court calendars has proven helpful in the following ways:

1. Stipulations and Agreements. If litigants indicate at roll call that they have an agreement, the self-help attorneys can assist them in writing that agreement into an appropriate form for the judge to sign.

2. Procedural Information. Helping litigants with procedural questions enables the judge to avoid spending the time to answer such questions. It can also correct paperwork problems promptly and eliminate needless continuances. If a continuance is necessary, the self-help attorney should notify the court clerk so the matter can be timely called. The litigants can be told what they must do before the next court date, and then they can leave.

3. Settlement Assistance. Without attorneys in the mix, self-represented cases often have no help to resolve a case.

After all, if self-represented litigants could resolve their disagreements amicably, they would not be in court. Using court-based self-help or volunteer attorneys in the courtroom gives the self-represented litigants a chance to settle their issues on the day of their hearing. In some instances, litigants may be able to settle all issues in their case and leave the courthouse with a judgment. If, after meeting with the attorney, the parties are not in agreement, the issues can be narrowed and the parties informed about what the judge will need to hear in order to make a decision in the case. Significant numbers of litigants need issues honed and documents organized and exchanged so that hearings can proceed in an orderly and efficient manner. This reduces frustration for everyone and actually allows more matters to be heard. In many cases with both parties representing themselves, a simple investigation reveals that there is no real dispute—they just don't know what they are supposed to do, or need someone to run a computer software support guideline before agreeing to an order.

4. Preparation of Written Orders and Judgments. Litigants need help with preparing written orders after the hearing and judgments. Most self-represented litigants have great difficulty in drafting clear and enforceable orders after the hearing. Qualified assistance at this stage not only enhances the court experience for them but also reduces the frustration to litigants and the courts of later attempts to enforce unclear or ambiguous court orders, resulting in a significant reduction of court time at later hearings.

5. Explanation of Orders. Self-help attorneys in the courtroom can also explain the legal terms used in the court's orders. When the court attorney is bilingual, he or she can explain legal terms to the litigant and answer the litigant's questions in a way that can't be done by the interpreter, who is ethically bound to interpret only what is said in the proceedings.

B. Child Custody Mediators

Particularly when mediation is mandatory, having mediators in the courtroom for those individuals who have not been seen in mediation

prior to the hearing date can be critical to avoid a continuance. This is especially true for matters that have been set with an order shortening time on a temporary restraining order.

C. Volunteers

It is extremely valuable to develop a volunteer pool that reflects the diversity of language and culture of the community.

1. Attorneys. They can assist with the same sorts of matters as the court-based self-help attorneys; however, careful training must be available to volunteers on how to deliver services without the appearance of bias.

2. Community-Based Social Services. These can also be resources in a courtroom setting so long as volunteers are trained on impartiality and in the specific services to be rendered to the litigants.

Many of the cases that a judge would refer to courtroom support staff will be cases that would otherwise have to be continued if staff were not available to help. Even with the help of support staff, some of the cases will have to be continued. When it is clear that a case must be continued, the best practice is to call the case as soon as possible and assign a new date rather than make the litigants wait through the calendar only to be told their case will not be heard.

VII. Cases Requiring Hearings

Once the cases that cannot proceed have been handled, and others referred to available courtroom support staff, the judge can begin the hearings.

A. Default Hearings

It can make sense to put default cases early in the calendar, provided the designated time for latecomers to arrive has passed. Default cases tend to move fairly quickly. Further, the litigants tend to be less anxious, since they are unopposed. By handling default matters first, the rest of the people in the courtroom are allowed to observe the judge and the courtroom staff to see how the process works and to become somewhat familiar with it. It also avoids making the default

litigants wait through long, contested hearings for their own very short ones.

It is important to allow parties a reasonable time to appear for hearings (e.g., 20 to 30 minutes from the time that the parties were noticed to appear). Therefore, if roll call and triage of cases are completed before that time, it might be best to call one or two of the contested matters first. Choosing a case or cases that appear to have low levels of animosity and few issues to handle, and that will move quickly, seems wise. The judge can then turn to the default matters when a reasonable time for the respondents to appear has passed.

B. Organizing Contested Hearings

If there are cases with attorneys representing the parties, they may benefit from some further efforts to settle their issues. Be sure they report back to the judge in time for a hearing prior to the end of the calendar. There may be cases previously referred to courtroom support staff for assistance that now need a hearing. The remaining cases would be ready for a contested hearing.

There are various ways to organize contested hearings. The following are some of the possibilities:

1. Less Serious Charges. In handling traffic and misdemeanor arraignment calendars, judges have found it useful to call the least serious cases first. Defendants will often accept prosecution offers or indicated sentences in these cases, and it helps get a good percentage of the cases heard in a relatively short amount of time. Also, if the most serious cases are called first, defendants' decisions not to resolve their cases and ask for the appointment of the public defender to represent them might set an example for defendants in less serious cases to pass up settlement opportunities that might be in their best interests.

2. Least Time First. Take the cases that seem likely to take the least amount of time first so that the litigants can leave. Of course, it is difficult to predict the amount of time the hearing will actually take. Taking estimates from lawyers is realistic; asking self-represented litigants for their estimates is generally not helpful.

3. Judge's Knowledge of the Case. Based on a judge's prior experience with a particular case or with similar types of cases, certain cases may be expected to be more or less contentious during a hearing. If so, some judges choose to start with the less contentious cases to set the tone for the hearings and to get short matters resolved first. However, there may be a case on the calendar in which the parties previously created a commotion in the courtroom; the judge may want to handle this case first to remove these "difficult" litigants from the courtroom.

4. Timekeeping. A judge might identify the number of cases likely to need hearings, figure out the amount of time left on the calendar, calculate an average available time per hearing, inform the audience of the average time, and keep to the time allotted for each hearing. Additional time could be offered at the end of the calendar if the judge's time estimate is off because more cases have settled, leaving additional time available for hearings.

5. Clustering Issues. Some judges cluster their cases, putting those with similar issues together based on their prior reading of the file. This allows them to focus on the specific legal issues to be considered. They may put the attorney cases first to allow the self-represented litigants the opportunity to hear and learn from the presentation.

6. Team Judging. In some courts, two or three departments have "teamed up" for a self-represented day calendar. Cases are assigned according to a direct calendaring system, but if one department finds that a particularly high number of litigants require contested hearings, the "team" department will be called on to take the overflow. The idea is that both departments are unlikely to overflow on the same day.

VIII. Dealing with General Hearing Issues

A. Avoiding Dropping Issues

In self-represented litigant cases, there is no attorney to make sure that issues are not dropped and that the court handles everything. A particularly busy docket, with cases involving multiple issues, makes it

easy to overlook an issue in a given case. Not only might this have a serious impact on the litigant, but when issues are overlooked, litigants will simply refile another set of papers to get another hearing, thereby causing themselves and the court an additional appearance. Keeping a checklist of issues on the cover of the case file helps avoid this problem.

It can also be valuable to raise issues that the litigants have not identified—for example, a litigant may file for a change of custody, not realizing that the divorce is not final. Alerting litigants to the need to take additional steps and referring them to the self-help center can help avoid major problems.

B. Getting Needed Information

Getting sufficient information on which to make an informed decision is central to any hearing. Information can come from a number of sources.

Self-represented calendars require assignment of judges with significant levels of subject matter expertise in the area of law involved. If litigants have not been to a self-help center to assist them with their pleadings, their declarations may contain confusing, superfluous, or contradictory information. It is unlikely that the judge will have the benefit of written points and authorities or trial briefs. Furthermore, litigants will not be able to reference relevant points of law during hearings to which a judge can refer. If judges are going to get the information they need to make knowledgeable decisions, they will often have to ask the parties questions. Therefore judges must know the questions they need to ask and how the law applies to the answers they receive.

A more complete set of suggestions for judge-litigant interactions appears below.

1. Documents, Photographs, or Other Physical Evidence. At the beginning of the calendar, litigants should be advised as part of the introductory script that any documents or other evidence received by the court must be shown to the other party first. The judge should also explain the process for marking exhibits and for referring to them. Litigants typically will be unable to lay the foundation for admitting documents, photographs, or physical evidence. If the other

side does not object, the court faces no problem in admitting the evidence; the judge retains the discretion to discount or disregard it as required by law. If the opposing party objects, the judge should question the proponent of the exhibit to bring forth the foundational information on which the judge can then rule on admissibility. See chapter 4 for a fuller discussion of these issues.

2. Investigator Reports. The less time available for meaningful hearings, the more judges are forced to rely on information gathered outside the court setting. Information from court investigators, for example, can be both helpful and problematic for judges in self-represented cases. The litigants will not be able to test the reliability of this information by examining the investigator during the hearing. This creates a far greater potential for inaccuracy in the data than in cases where attorneys are able to review these reports with clients and identify any inaccuracies. To minimize the potential for error, litigants should be provided with copies of investigators' reports in advance of the hearing and be given sufficient time to identify and respond to any erroneous material that they find. And judges should be willing to hear complaints from self-represented litigants about inaccuracies in investigative data. See chapter 9 for a fuller discussion of these issues.

3. Expert Reports. Judges may also be getting information from experts such as forensic psychologists, vocational counselors, or accountants. In cases involving self-represented litigants, psychological experts may be more common. This sort of information can present more pitfalls for a judge than investigative information because it includes the expert's opinions. Self-represented litigants have no idea how to inquire into the credentials of experts or the quality of their opinions. It is a problem when a psychologist's report, for example, is written using arcane psychological terms. If psychological testing has been included, the problem is aggravated. Professionals in the field of psychology are not in agreement about the use of testing or the role it should play in the law. Attorneys and judges are outside their own field of expertise when it comes to evaluating experts' reports, and self-represented litigants are at a total loss.

Questions are not asked about whether doctorates were obtained at accredited schools, whether tests have been validated for the purpose being used, whether experts are qualified to administer the tests given, whether test administration was proper, what the most current literature says, what limits there may be to this person's expertise in psychology, and so forth. In reality, the more factual data that a judge can glean from an expert's report, the more helpful it will be. Once again, ensuring that the self-represented litigant obtains a copy of the report well in advance of the hearing appears to be the only available, even though minimal, safeguard.

4. Information From Court Staff or Court Files. Judges may also be getting information from various court staff members. One example would be the procedural information provided by staff doing readiness reviews of the cases prior to the calendar. Other examples might include the following:

   a. Criminal histories on domestic violence calendars;
   b. Identification of other cases involving the same parties;
   c. Restraining orders in other cases involving the same parties;
   d. Child custody orders from other cases involving the same parties;
   e. Findings and orders from other cases;
   f. Compliance reports from court-ordered services (e.g., drug testing); and
   g. Child custody recommendations.

   Whenever a judge obtains information outside the courtroom, it is critical that the litigants not only be made aware of the information that the judge has but also have an opportunity to respond to it. The potential for error, particularly when dealing with cases involving common surnames, can be great, and input from the litigants is essential to avoid mistakes. When judges receive information from staff working inside the courtroom, the information should be received either in writing with copies provided to both parties and to the judge, or the judge should state on the record in the presence of both parties

the nature of the information received and request confirmation from the litigants of its accuracy.

5. Avoiding Ex Parte Communications With Staff. It is never permissible to have discussions with staff about information that bears on pending decisions in private out of the presence of the parties. Allowing self-help attorneys, volunteers, child custody mediators, or others in the courtroom who may be working directly with litigants to have access to the judge privately outside the presence of the parties conveys an appearance of "backdoor justice" that not only may constitute actual impermissible ex parte communication but definitely undermines the procedural justice goals for the court. If a situation does arise, such as when safety is an issue, when a judge does receive information from courtroom staff outside the presence of the parties, this should be fully disclosed to the parties at the earliest possible opportunity at the start of the hearing, and the parties should be given an opportunity to respond.

6. Avoiding Overly Friendly Conduct Toward the Attorney If One Party Is Represented. Many attorneys appear often before court staff and judges and may know them well. These attorneys may walk around the courtroom freely and joke with clerks in a way that a self-represented litigant or an outsider would never be allowed to. The self-represented litigant may perceive this as favoritism or may think that the judge will be prejudiced in favor of the attorney.

C. Answering Litigants' Questions

The ability to provide clear explanations to litigants during the hearing is a significant asset to a judge during a self-represented litigant calendar. While judges cannot answer questions about litigants' tactical or strategic issues, they can and should answer questions about procedure or definition of legal terms. If self-help attorneys are present in the courtroom or available at a court self-help center, referral to such resources can provide the judge with a way to help self-represented litigants without taking the time to answer their questions.

The major issue with questions tends to be the amount of time required to answer them rather than the nature of the questions

themselves. If a judge can refer the litigants to self-help attorney staff to answer questions, hearing time is maximized. When the judge makes the order in a case, it is best to be clear that the parties actually understand the order. Clearly explaining the terms of the order is well worth the time. Explaining the reasoning may also be helpful. Even when litigants don't agree with the outcome, they are more likely to comply if they understand that the decision was not arbitrary.

D. Identifying Elevated Anxiety Levels of Litigants

It may be difficult for judges and court staff, who are very familiar with the courtroom setting and court procedures, to appreciate the anxiety that many litigants experience in a courtroom. The setting is designed to be formal and austere, to reinforce the court's authority. The language and procedures are totally foreign to any other setting in which litigants typically find themselves. Many court matters are of significant consequence to the participants, with the potential to change the course of their lives. For litigants, not knowing exactly what to expect, trying to keep in mind the key points to bring to the judge's attention, trying to anticipate the tactics and statements of the opposing party, and having fears about the outcome of the hearing contribute to potentially very high states of anxiety. Even lawyers have been known to forget basic facts because of high stress levels, so imagine how much worse it is for a self-represented litigant appearing in court for the first time on a matter of key importance to his or her life.

> You do get cold feet when you get there [court]. It's like what do I do? What do I do?
>
> —Self-represented litigant

This is particularly true for immigrants and litigants with limited English proficiency, who not only may not understand English but may not understand the U.S. legal system or how it operates. They may be concerned about being deported or arrested.

> I don't ever want to go back to court. That was the scariest thing that I have ever experienced.
>
> —Self-represented litigant after uncontested default divorce hearing

It is possible that a litigant may become too anxious to participate reasonably in the hearing. If so, a recess should be taken to allow the person a chance to calm down before further action is taken. Providing the litigant with an opportunity to go out of the courtroom, have a glass of water, or otherwise "take a break" can provide the time needed for him or her to regain composure. The judge might suggest that the litigant come back into the courtroom to observe other hearings before recommencing his or her hearing. Courtroom support staff, if available, might also be helpful in calming a frightened litigant.

E. Ruling From the Bench

Generally, decisions should be made from the bench whenever possible. Taking routine matters under submission will seriously increase the burden on the judicial officer.

When explaining a decision from the bench, the judge can use the full range of his or her communication skills, including intonation, body language, and eye contact to convey sincerity. The judge can summarize the arguments of the parties so that they are aware that their viewpoints have been heard and considered. Sending a written order after the fact reduces significantly the judge's ability to convey a sense of fairness; individual words in a written order or opinion can easily be taken out of context to create unnecessary hard feelings.

Furthermore, requiring the parties to wait for their order eliminates the opportunity for them to ask the judge for clarification. When litigants understand the orders that the court makes, they are more likely to comply with them.

Exceptions occur when a judge needs to research an area of the law before rendering a decision or when rendering a decision in the courtroom would clearly increase the serious emotional distress of a litigant. The latter situations should be rare. In most cases, an immediate ruling benefits the emotional state of the parties, eliminating continuing anxiety about the outcome.

Matters taken under submission should be decided promptly, and the parties notified of the judge's decision by mail.

F. Providing Written Orders

Lack of written orders creates time loss and frustration for litigants, judges, and law enforcement. If possible, the litigants should leave the courtroom with written copies of the court's orders. Leaving the task of preparing written orders to the self-represented litigants is not realistic in most cases. Unless there are self-help center attorneys or other qualified staff available to assist in preparing orders, the chances are that no orders will be prepared, that the submitted orders will be incomplete, or that the judge will have to completely rewrite the orders submitted—at a time when the matter is no longer fresh in his or her mind.

If staff are to prepare orders, it is most effective to have them present in the courtroom to hear the decision as it is announced, but litigants can also be referred to a self-help center to have an order after hearing prepared (or explained). If this is the case, a referral slip with detailed order after hearing information and a copy of the minute order will help the self-help center staff. It should be noted that minute orders need to be more detailed and comprehensive for self-represented litigant cases. The frequent lack of formal orders after hearings makes detailed minute orders critical to the court's ability to track its own past actions in these cases without requiring a transcript of the record.

IX. Contested Hearings Involving Two Self-Represented Litigants

Judges have found the following suggestions helpful in handling contested matters involving two self-represented litigants.

> I explain the process of the hearing and reassure the parties that each will be heard. And I make sure that happens! It usually takes less time to get the information I need because I ask the questions and hear it directly from the parties. The credibility is easier to evaluate from the parties' testimony and demeanor.
>
> —Judge

1. Setting the Procedural Ground Rules. The judge should explain to the parties how the hearing or trial will proceed.

2. Providing Materials for the Parties. The court should provide copies of a six-month calendar at each place at counsel table to which each party may refer. In addition, the court should provide pencil and paper for making notes, recording the judge's decision, and recording the date and time of a future hearing (unless the courtroom clerk prepares that notice).

3. Outlining the Legal Issues the Judge Must Determine. Many judges find it helpful to explain, in lay language, what he or she must decide during the hearing. For instance, in a motion for a change in the amount of child support, the issues are whether there has been a material change in the incomes of the parties or in the time the child spends with each parent, and, if so, whether a change in the amount of support is warranted. The judge should note which party has the burden of proving these legal elements.

   If the calendar consists of a series of similar hearings, this explanation need not be repeated for each hearing. The judge can merely ask the parties if they understand, based on the previous hearings, what the judge must decide.

   If self-help centers and the judges communicate about procedures and the types of facts that judges will take into consideration, handouts can be created and litigants will have been told or informed of many of these things at different times, in different settings, and by different methods. This will reinforce the information and help create consistency so that litigants will know what to expect.

4. Summarizing the Pleadings. The judge can save considerable time by demonstrating his or her familiarity with the basic written contentions of the parties. The judge can take this summary from the cover sheet prepared by staff, augmented by the judge's own notes made during the file review. This summary also demonstrates to the parties the judge's concern about the case.

5. Swearing the Parties. The judge must remember to have the parties sworn prior to taking their testimony. This can be a time to remind them to stick to the facts relevant to the issues previously outlined by the judge.

6. Hearing the Parties' Stories in a Structured Fashion. The judge should make it clear from the beginning who will go first, and that each side will have the same opportunity to talk. The judge should ask the moving party to present his or her evidence for the first issue the court must decide. If, for example, that issue is whether the court has jurisdiction over the matter, it should be simple to resolve. If the moving party falters in presenting evidence, the judge can ask questions to elicit the needed information (i.e., "How long have you lived in this county?"). The judge can then ask the opposing party if he or she disagrees. The judge can then announce his or her decision on the first issue (i.e., "I find that the court has jurisdiction over this matter.").

   The judge should then proceed to the second issue, asking for evidence from the moving party, asking questions if necessary to elicit the needed information, giving the opposing party an opportunity to contest the information, and ruling on the issue.

7. Controlling the Courtroom. The judge can promptly redirect a party who begins testifying on irrelevant information. The judge should also be quick to silence any interruptions by either party, reminding them that each side will have an opportunity to ask questions or present opposing testimony in turn. As judges well know, the temptation to interrupt during hearings is not exclusive to self-represented litigants.

8. Announcing the Ruling and Preparing a Written Order or Judgment. The general principles on ruling from the bench and having the court prepare the written order or judgment apply.

X. Contested Hearings Involving One Represented Litigant and One Self-Represented Litigant

Many judges report that they dread these hearings because they perceive that they have less flexibility and feel that they must require the self-represented litigant to perform to the level of the lawyer. Other judges report a contrary experience—that lawyers now have sufficient experience with these types of proceedings to realize their common interest with the judge in ensuring that the matter is resolved on its merits.

The most important principles are the following:

1. To give the lawyer an opportunity to present his or her client's case and to advocate for his or her interests; but

2. To proceed in such a manner that the self-represented litigant is able to participate fully in the hearing; and

3. To prevent the lawyer from stymieing the self-represented litigant in presenting relevant, material, and admissible testimony and other evidence.

Judges have found the following procedures useful in these cases.

A. Proceeding As If the Case Involved Two Self-Represented Litigants

The judge should explain the ground rules, outline the legal issues to be resolved, and summarize the pleadings just as if the case did not involve a lawyer. The judge may also want to point out that neutrality may require questions of both parties if matters are not clear, and that such questioning should not be interpreted as providing assistance to one side or the other.

B. Asking the Self-Represented Litigant to Present His or Her Case in a Structured Fashion

The judge should proceed as if both parties were self-represented.

If the lawyer poses objections to the self-represented litigant's testimony or exhibits, the judge can respond in one of the following ways:

1. Asking the Lawyer to Explain the Basis of the Objection in Sufficient Detail Understandable to a Layperson. The self-represented litigant can usually remedy a defective question or provide a sufficient foundation for an exhibit, if an adequate foundation exists, if the process is explained.

2. Asking the Lawyer If His or Her Client Objects to the Admissibility of the Information or Exhibit or Merely to the Form of the Question or the Manner of Its Introduction. If the objection is to form only, the court can note the objection on the record and proceed to allow the information or exhibit into evidence.

3. The Judge Posing the Question. The judge can cut through legal entanglements by posing a question in legally proper form.

4. If the Lawyer's Behavior Is Seriously Delaying the Matter or Preventing the Presentation of Material, Relevant, and Admissible Evidence. The judge can explain the availability of interim orders pending a continuance (which might make the continuance unnecessary or unpalatable). The judge may potentially make a fee order providing that the represented party pay the costs of the other party to allow him or her to consult with or hire an attorney because of the opposing attorney's conduct. The judge may also indicate that no fee awards will be made in favor of the represented party if the case is continued because of the conduct of the attorney, and ask that the lawyer confer with his or her client to determine how to proceed.

5. If the Lawyer Objects to the Procedure. The judge can explain the neutral purposes of the proceeding and allow the attorney to put the objection on the record. If the attorney continues to object, the judge can "note your continuing objection to my method of proceeding. Your rights are protected."

C. Controlling the Courtroom

The judge should maintain the same tight control over the courtroom as if two self-represented litigants were present, not allowing either the self-represented litigant or the lawyer to interrupt each other. This is important not only to ensure a correct decision on the merits in the case, but also to reassure those litigants waiting to be heard on other cases that the court takes their rights seriously, wants to hear their story, and will not allow the other side to derail this important process.

D. Announcing the Ruling and Preparing a Written Order or Judgment

The general principles on ruling from the bench apply. However, the judge can ask the lawyer to prepare a written order or judgment embodying the court's ruling and submit it to the self-represented litigant for review. The judge can explain to the litigant that he or she should review the draft order for accuracy. If the court is structured to prepare those orders in the courtroom, the judge should proceed to generate the order or judgment as if the case involved two self-represented litigants, particularly if the lawyer's client did not prevail in the matter.

XI. Scripts and Helpful Phrases for Developing Courtroom Styles

The following materials are provided as examples of approaches judges can take in introducing parts of the hearing process to self-represented litigants. Additional materials are included in the appendix. Every judge will need to adapt them to the type of case, the circumstances of a case, and to the judge's own personal style.

While it can be useful to have specific wording, remember that how information is conveyed is as important as what is said. It is usually better to avoid reading a script; rather, the judge should be familiar enough with the message that he or she can look at the litigants while saying it. The bored airline flight attendant giving the standard preflight information about exits and seat belts and no smoking is not the model. Racing through the script is also more frustrating for listeners for whom this is new information, which they do not want to

miss. Many judges use their voice to emphasize the meaning of the message and to monitor the reactions of the participants: Are they paying attention? Are they getting it? Do they have questions? It is often helpful to build in opportunities for participants to ask questions.

A. Sample Preliminary Instructions

"The procedures we follow in court are used to make sure that each side gets a fair opportunity to be heard. I will give each side the chance to tell its story. I might ask for more information or details, and I might check to make sure I understand what is being said. Some of the things that seem important to you might not be part of what I can consider in making my decision. I may interrupt either side if I don't understand the point being made, if I have heard enough on the point, or if you are going into an area that I cannot consider in making my decision. Sometimes I might explain what you need to show me about certain kinds of evidence so that I can consider it and decide how important it is. The other side may object to some of the things you say or offer as evidence. I am bound by the legal rules of evidence and will follow them in ruling on such objections and in deciding what evidence to consider in making my decisions in the case. In order to make the process work as well as possible, I might find it necessary to stop the hearing and recommend that one or both of the parties consult with other resources such as the self-help center or a lawyer."

"First I will listen to what the petitioner wants me to know about this case, and then I will listen to what the respondent wants me to know. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. Please do not interrupt while the other party is presenting his or her evidence. Everything that is said in court is written down by the court reporter, and in order to ensure that the court record is accurate, only one person can talk at a time. Wait until the person asking a question finishes before answering, and the person asking the question should wait until the person answering the question finishes before asking the next question."

B. Sample Basic Rules for Evidence Presentation

"Evidence can be in the form of testimony from the parties, testimony from witnesses, or exhibits. Everyone who testifies will be placed under oath and will be subject to questioning by the other party. All exhibits must first be given an exhibit number by the court clerk and then must

be briefly described by the witness who is testifying and who can identify the exhibit. The exhibit is then given to the other party who can look at the exhibit and let me know any reason why I should not consider that exhibit when I decide the case. I will then let you know whether the exhibit can be used as evidence."

"I have to make my decision based on the evidence that is admissible under the rules of evidence. If either party starts to present evidence that is not admissible, I may stop you and tell you that I cannot consider that type of evidence. Some examples of inadmissible evidence are hearsay and irrelevant evidence. Hearsay is a statement by a person who is not in court as a witness: hearsay could be an oral statement that was overheard or a written statement such as a letter or an affidavit. If a party doesn't object to it, I can consider hearsay evidence. Irrelevant evidence is testimony or exhibits that do not help me understand or decide issues that are involved in this case. Sometimes you may want to tell me information that you think is important, but that is not legally relevant. If you do, I will stop you, because I am not allowed to consider legally irrelevant evidence."

C. Sample List of Elements to Be Proved

The statement of the list of elements should be short and clear with no explanation of legal nuances. Where possible, it is helpful to explain what evidence can prove the listed elements.

"A motion to modify child support must establish a change in the financial situation of one of the parents or a change in the time that each parent is responsible for the children. Evidence would include a pay stub, tax return, and so forth."

"Petitioner is requesting an order for protection. An order for protection will be issued if the petitioner can show that she is the victim of domestic abuse. Domestic abuse means that she has been subject to physical harm or that she was reasonably in fear of physical harm as a result of the conduct or statements of the respondent."

"Petitioner is requesting a harassment restraining order. A harassment restraining order will be issued if the petitioner can show that she is the victim of harassment. Harassment means that she has been subject to repeated, intrusive, or unwanted acts, words, or gestures by the respondent that are intended to adversely affect her safety, security, or privacy."

D. Sample Questions to Elicit Critical Information

In cases with common elements, asking the questions necessary for the legal determination allows judges to get the facts they need and allows time at the end for any other information that the litigant wants to provide. Often, the opportunity to answer the critical questions is enough for the litigant.

"Give me a few minutes to get some basic information that I have to have in these types of cases, which will give us more time for you to spend on necessary details."

For a security deposit case:

1. Did you have a written contract?
2. Was a 30-day notice sent?
3. Was the plaintiff on the contract?
4. Is the defendant the owner?
5. How much was the rent?
6. How much was the deposit?
7. Was the key returned?
8. Was an inspection notice requested? Was it completed?
9. Was the 21-day letter delivered or mailed?
10. Was any amount of the security deposit returned?

For a hearing on spousal support:

1. How are current monthly living expenses paid?
2. How were monthly living expenses paid when you lived together?
3. Were there any other sources of income or assets for monthly living expenses?
4. Did both of you review and sign federal tax returns?
5. What documents or records did you use to determine your income on the Income and Expense Declaration?

"I have read the papers asking for the restraining order. Mr. Respondent, is there anything you disagree with in the declaration asking for the restraining order?" Often, the respondent will agree or only disagree about things that are not legally relevant. "Thank you, Mr. Respondent. But what you've told me indicates that there is indeed a basis for a restraining order, and I will go ahead and grant it."

E. Sample Questions to Establish the Foundational Requirements for Documents and Photographs

"What is this? Why do you think this is helpful to me in deciding the case? How was it obtained? Does it accurately portray what it's supposed to show? When was the photograph taken?"

F. Sample Questions to Establish the Admissibility of Hearsay

"When was this said? What were the circumstances when it was said? Why do you think this would be helpful to me in deciding the case? Why do you think I should take it seriously?"

G. Sample Approach to Swearing Both Parties

This approach removes the need for distinctions between arguments and testimony:

"You must remember that you are under oath throughout the hearing (or trial). Anything you say—as a statement, question, or argument—must be truthful."

H. Sample Setting of Ground Rules When One Party Is Represented

"Mr./Ms. Attorney, I intend to use relaxed language and relaxed rules of procedure today to ensure that Mr./Ms. Self-Represented Litigant understands what is happening and to ensure that he or she is able to participate effectively. I ask you to do the same—to avoid the use of legal jargon and to explain the points you wish to make in language that both I and Mr./Ms. Self-Represented Litigant can understand."

I. Sample Response to a Resistant Attorney

"If we proceed under formal rules of evidence, you (the attorney) will be required to explain to the self-represented litigant the *basis* for any objections you make—with enough detail that the self-represented litigant can take the corrective steps necessary to proceed. For instance, if you object to a leading question, you would need to explain

that objection sufficiently so the self-represented party will be able to pose an appropriate nonleading question."

"I overrule the objection on the grounds that Mr./Ms. Self-Represented Litigant is proceeding in substantial, if not exact, compliance with the rules of evidence. Counsel, I invite you to make a continuing objection that can be noted on the record so that we do not have to interrupt Mr./Ms. Self-Represented Litigant's presentation for this same sort of objection."

"Counsel, does your client contend that this document is either inadmissible or something other than what it purports to be?"

J. Some Generally Helpful Phrases

1. "I understand and appreciate . . .";
2. "Please talk directly to me, not to ____";
3. "Stay with the facts of the case—rulings are based on the law—not on personal issues";
4. "Anger is not persuasive"; and
5. "Raising your voice is not helpful."

It may not be necessary to stop an interrupter verbally; merely raising your hand as a "stop sign" may suffice. Use of the gavel is appropriate if the interrupting behavior persists.

K. Some Sample Nonconfrontational Questions

1. "Give me a little more information about" _____
2. "Help me understand" _____
3. "Tell me more about" _____
4. "Give me some specific details about" _____

5. “Give me a word picture—kind of like a slow-motion instant replay” _____

L. Some Ways to Control the Interrupter

1. “I know that it is difficult to wait your turn. I assure you that I will see that you are allowed your turn as well.”

2. “When you speak, I will be sure that you are not interrupted either.”

3. “Remember that one of the ground rules that I talked about at the beginning is that we don’t let people interrupt each other.”

4. “I’m going to call for a recess [or continuance] in this case.”

5. Holding up your hand.

M. Ways to Recognize and Validate the Litigant

1. “I can tell that you really care about your children.”

2. “It sounds like you really tried to . . .”

3. “I’m really impressed that you’ve been able to work out so many issues today.”

Conclusion

This chapter has described some of the techniques that judges use to handle cases with self-represented litigants that meet the needs of both the courts and litigants. This is an area where judges have tremendous flexibility in developing a personal style that allows them to communicate their genuine concern to the litigant while allowing all persons in court to be heard.

Chapter 7: Settling Cases

7

Settling Cases

Introduction

Self-represented litigants frequently welcome assistance in settling their disputes before the hearing or trial. Without representation by counsel or assistance from the court, litigants usually do not have a realistic opportunity for meaningful settlement discussions prior to their scheduled court date. However, when presented with an offer to engage in mediation or settlement negotiations, many accept assistance gratefully and are able to resolve their disputes with the help of a neutral third party.

There are, however, some special challenges in settlement efforts in cases involving self-represented litigants. Most important among these is that these litigants may not come into the settlement process with enough information about their legal rights and the potential outcome of their dispute in court to meaningfully negotiate with the other side and make reasoned decisions about whether and on what terms to settle. These litigants may also be particularly vulnerable to pressure to settle, which could leave them feeling that they were denied their "day in court," and feeling dissatisfied with the court system as a whole. In designing settlement strategies to assist self-represented litigants, judges and court staff should therefore think carefully about how to address these challenges.

This chapter describes some of the common settlement assistance processes and their benefits and challenges for self-represented litigants and offers suggestions for how courts and judges can facilitate and encourage settlement discussions in ways that support self-represented litigants. In California, different statutes and rules of court regulate different types of processes and case types. While recognizing those differences, this chapter focuses on common issues in cases with self-represented litigants.

I. Benefits to Providing Settlement Assistance

Both litigants and the court can benefit from providing settlement assistance to self-represented litigants before hearings and trials on their cases. For litigants, the potential benefits include:

1. Less Formal and Complex Procedures. The procedural and evidentiary rules that apply at trial either do not apply or are relaxed in settlement processes, which typically makes these processes easier for self-represented litigants to understand and navigate.

2. More Time to Explain the Situation. Settlement processes may allow litigants more time and opportunity to explain their situation in full context than they might have in the courtroom. This additional time and attention can be critical to enhancing self-represented litigants sense of procedural justice.

3. Ability to Address Broader Range of Issues. Settlement processes, particularly mediation, may also allow the litigants to address issues, such as emotional issues, that would not be considered at trial. By addressing all of the parties' interests, a more comprehensive resolution of the dispute is possible.

4. Ability to Agree to Creative Solutions. In settlement processes, particularly mediation, litigants can create solutions to their disputes that could not be ordered by a court and that can often better address all of their interests. When the parties agree on their own resolution, they may be more likely to comply with its terms than if a decision is imposed on them

5. Possible Benefits Even Without Settlement. Participation in settlement discussions may have benefits even when the discussion does not resolve the case. The process may resolve some issues or help the parties focus on the facts and issues in dispute. Such processes may also allow

litigants to rehearse their presentations and to reduce their anxiety in presenting their case to the court.[43]

For the courts, potential benefits of offering settlement assistance:

1. More Satisfied Litigants. A survey of litigants and their attorneys indicated that they were more satisfied with the services provided by the court when they had access to mediation through the court.[44]

2. More Judicial Time. A study of mediation programs in California trial courts found that these programs can reduce the number of trials and hearings held by the court. This, in turn, can free up time that judicial officers can spend on those cases that most need their time and attention.[45]

3. Reduced Time to Disposition. This same study found that court-connected mediation programs can reduce the time to disposition, which can help courts meet their goals for disposing of cases in a timely manner.[46]

II. Settlement Assistance Options

Settlement assistance services for self-represented litigants can take a wide variety of forms. The court can offer different settlement process, from mediation to arbitration. The processes might be conducted by judges, temporary judges, attorneys, or court-employed mediators or community mediators. These services can be provided at the time of a hearing, trial, or other court-scheduled event. The settlement processes can take place in the community or at the courthouse.

---

[43] One judicial officer has observed that even where mediation has not resulted in a resolution and trial has been held, the litigants better understood the process and more readily accepted the outcome. William O. Scott, Jr., Court Commissioner, Butte County Superior Court, letter to Judy Garlow, Director, Legal Services Trust Fund, State Bar of California, Aug. 31, 2005.

[44] Evaluation of the Early Mediation Pilot Programs, Administrative Office of the Courts, 2005, pages xx-xxi and 53-64. This report is available at: www.courtinfo.ca.gov/reference/documents/empprept.pdf

[45] Id. at pages xx-xxii, 41-43. and 70-76.

[46] Id. at pages xx and 44-52.

This section discusses some of the pros and cons of different options a court might want to consider when designing a settlement assistance program that will be serving self-represented litigants

A. Which Process to Offer?

There is a broad range of different alternative dispute resolution (ADR) processes.[47] Three of the processes most commonly used in litigated cases are mediation, settlement conferences, and court-connected arbitration.

1. Mediation

In mediation, a neutral third person facilitates communication between the disputants and helps them try to reach a mutually acceptable resolution. The process is informal, and the neutral's role generally consists of helping the parties communicate with each other, clarifying disputes, and, if possible, reaching a resolution. The mediator does not impose or compel a settlement or a particular result; the disputants themselves decide whether to resolve their dispute and on what terms. As discussed below, there are also special, stricter confidentiality requirements that typically apply in mediation and are intended to encourage open and honest communication in this process.

Because mediation is the least formal and most flexible of the frequently used ADR process, it may be the most appropriate for self-represented litigants who are struggling with the formal procedural requirements of the litigation process. It is important to note, however, that mediators may use a variety of different techniques, or "styles," of mediation to encourage settlement. One of the most common ways that mediator styles are classified is as facilitative or evaluative.[48]

i. *Facilitative Mediation*. In facilitative mediation, the mediator focuses primarily on helping the parties' negotiate. At the extreme, facilitative mediation may consist of simply helping the parties to communicate with and understand each other. The

[47] For more comprehensive information about these and other ADR processes, see the CJER Bench Handbook, *Judges Guide to ADR*.

[48] *See generally,* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed* (1996) 1 Harv. Negot. L. Rev. 7.

potential benefits of facilitative mediation with self-represented litigants include:

- It allows litigants a greater opportunity to express their concerns, including concerns about issues, such as emotions, that would not be considered in a process focused on purely legal issues;

- It allows litigants to craft a resolution that addresses all their concerns; this, in turn, may improve satisfaction with the mediation and court processes;

- It may improve communication and help parties who will have an ongoing relationship avoid or resolve future disputes.

The potential challenges with purely facilitative mediation include:

- Litigants who are not aware of their legal rights or norms for resolving similar disputes may be disadvantaged in negotiating an agreement; and

- Some parties may be less likely to reach agreement without a third person's assessing the dispute or "pushing" the parties to reach settlement.

ii. *Evaluative Mediation*. In evaluative mediation, the mediator focuses primarily on assessing the issues that may be important to the dispute, which, in a litigation context, typically includes the likely outcome of such a dispute in court. At the extreme, evaluative mediation may include actions intended to direct the outcomes of the mediation in a manner that the mediator considers appropriate.

The potential benefits of evaluative mediation with self-represented litigants include:

- An assessment from a neutral person who is aware of the law and norms for resolving similar disputes may help the parties have a more realistic sense of the likely outcome in court, which may encourage settlement;

- The mediation outcome is more likely to reflect legal rights or norms for resolving similar disputes;

- Some parties may be more likely to settle if the neutral "pushes" them.

The potential challenges with purely evaluative mediation include:

- Litigants may not have the opportunity to express or address non-legal concerns which may be fueling the litigation;

- Some litigants may feel coerced by "pushing" from mediators; and

- To properly provide an evaluation, mediators must have expertise in the subject matter of the dispute.

While many mediators might be classified as predominantly facilitative or evaluative, most use a combination of these techniques that they think will help in the particular dispute. If your court wants mediators in its program to use, or refrain from using, a particular style or technique it is therefore important to communicate this to the mediators. It is also important to inform parties about mediation styles so that they will have appropriate expectations about the mediation process. Such an explanation is an integral part of the orientation required by CRC 5.120(e) for mediation of custody and visitation issues. In addition, if the parties will be selecting the mediator, this information is important to help them select someone who will use techniques that best meet their expectations and needs.

2. Settlement Conferences[49]

In settlement conferences, the parties meet with a neutral third person to explore settlement options. The neutrals are often judicial officers or experienced attorneys serving as a temporary judge. Settlement conference procedures vary from neutral to neutral and from dispute to dispute, but are generally informal. Neutrals often use techniques similar to those used in mediation; however, in a settlement conference, the neutral generally focuses more on purely legal issues and takes a considerably more active role in trying to guide the parties to a resolution that the neutral believes is appropriate. Typically, the neutral evaluates the case based on knowledge of the law and prior experience and then seeks to persuade the parties to change positions

[49] These may also be referred to as status conferences in some areas, such as in family law cases in California.

and move toward a compromise settlement. As in mediation, the neutral does not render a decision; the ultimate decision about whether and how to resolve the dispute is left to the parties.

3. Court-Connected Arbitration

In arbitration, a neutral person hears arguments and evidence from each side and then decides the outcome of the dispute. Thus, unlike in either mediation or settlement conferences, in arbitration the neutral is a decision-maker. This makes arbitration more like the regular trial process than either mediation or a settlement conference. However, arbitration is still less formal than a trial, and the rules of evidence are often relaxed. In addition, in court-annexed arbitration programs, the arbitrator's award is non-binding; the parties do not have to accept the arbitrator's decision, they can ask for a "trial de novo."

California has a court-connected arbitration program, called "judicial arbitration," that is established by statute (Code of Civil Procedure sections 1141.10 et seq.). Under this program, the arbitrator's decision will be entered as the judgment in the case unless a party requests a trial de novo with 30 days after the arbitrator files the decision with the court (Code of Civil Procedure section 1141.20). If a party requests a trial de novo and the judgment at trial is not more favorable that the arbitrator's decision, the court must order the party to pay certain costs of the other party and the court (Code of Civil Procedure section 1141.21).

B. Should Participation in the Settlement Process be Voluntary or Mandatory?

Whether participation in a settlement process is voluntary or mandatory will typically depend on the laws or court rules that authorize the particular program.

1. Mediation. For the most part, mediation involving self-represented litigants will be voluntary. There are certain exceptions to voluntary mediation in California, however. There is mandatory mediation of all child custody and visitation disputes (Family Code 3170). In civil cases, the Superior Court of Los Angeles County and any other superior court that chooses to opt into this statutory program may order mediation in cases that are otherwise eligible to be ordered to judicial arbitration (i.e. civil cases

valued at under $50,000 per plaintiff) (Code of Civil Procedure sections 1775 et seq. and CRC 3.870 et seq.). Some courts may also have established mandatory mediation programs by local court rule.

2. Settlement Conferences. These might be either mandatory as part of a caseflow management system or voluntary. In California, the court may mandate a settlement conference in civil cases under California Rule of Court 3.1380. In family law cases, the court may set a status conference on its own motion (Family Code 2450).

3. Court-connected Arbitration. Court-connected arbitration is usually part of a mandatory court program. In California, courts with over 18 judges are required to send non-exempt, unlimited civil cases valued at under $50,000 per plaintiff to mandatory judicial arbitration. Smaller courts have the discretion to do so. (California Code of Civil Procedure 1141.11 et seq.) Cases that are exempt from this requirement include cases where the court concludes arbitration would not reduce the time and expense of litigation; eviction cases; small claims cases; and cases that include nonfrivolous requests for equitable relief such as civil harassment, elder abuse, and domestic violence restraining orders. (CRC 3.811.) Most family law cases are also exempt from referral, but courts may order cases involving the division of community property valued at $50,000 or less to judicial arbitration if the parties have not agreed to a voluntary division (Family Code §2554). These exempt cases are all ones that frequently involve self-represented litigants; thus, mandatory judicial arbitration is often not used with these self-represented litigants.

   In any case, regardless of the amount in controversy, the parties may also voluntarily stipulate to use judicial arbitration. In addition, if the plaintiff agrees that the judicial arbitration award will not exceed $50,000, the plaintiff can elect to have the case submitted to judicial arbitration.

The potential benefits of voluntary participation with self-represented litigants include:

- Litigants may be more likely to settle their cases if participation in a settlement process is voluntary; and

- Obtaining the parties' voluntary agreement will help ensure that they appreciate and participate meaningfully in the process.

The potential disadvantage of voluntary participation is that fewer cases typically end up participating in the settlement process if litigants have to agree to participate in the process, so fewer cases are resolved through this process or otherwise benefit from it.

The potential benefits of mandatory participation in a settlement process include:

- More cases typically end up participating in the settlement process;

- Participating in a settlement process is often beneficial when appropriately ordered without the parties' agreement.

The potential disadvantages of mandatory participation include:

- Litigants may feel coerced into participating in the process and therefore may not meaningfully participate; and

- A smaller proportion of the participating cases may settle when participation is mandated.

Some courts have combined mandatory and voluntary elements in their programs. For example, the court may mandate that parties discuss settlement process options with the court's ADR administrator but allow the parties to voluntarily choose whether to participate in a settlement process after this discussion.

Particularly if participation in a settlement process is mandatory, it is important that the court help the litigants understand that this process is not an obstacle to keep them from their day in court but an opportunity to participate directly in the resolution of their dispute. In the case of both voluntary or mandatory programs, as discussed below, it is very important to provide litigants with information about the settlement assistance available through the court. If participation in the court's settlement process is voluntary, self-represented litigants are not likely to volunteer to participate without this information. If participation is mandatory, litigants are likely to be upset about being

referred to the settlement process if they have not received information about this process.

C. Which Cases Are Appropriate for Referral to a Settlement Process?

Not every case is suitable for referral to alternative dispute resolution. While the self-represented can reap particular benefits from the assistance of a neutral, the risks of harm are also maximized when a litigant is inappropriately referred to a settlement process, since that litigant has no attorney to protect him or her. Among the areas in which particular caution should be used in referring any, but particularly self-represented, parties are the following:

1. When a litigant lacks mental capacity – Such litigants should not be referred to a settlement process where they are required to participate on their own. Any agreements into which they enter may be inequitable, impracticable, or unenforceable.

2. If a case presents an apparent potential for violence, or a substantial disparity in power – Particular caution must be taken if using mediation or settlement discussions in these cases. If such a case is referred to a settlement process, the court should be particularly careful to ensure that the neutral conducting the process has the appropriate training to handle this type of case. CRC 5-215 sets out detailed domestic violence protocols in court-connected custody mediation. It provides for a variety of screening procedures and safety precautions including requiring the mediator to conduct an assessment of violence to determine how best to protect the victim and address the power imbalance. It also makes it clear that the issue of violence itself cannot be mediated.

Before making referrals, judges or others making these referrals should consider also any financial burdens on the self-represented, and any other potential consequences, such as an enhanced risk of violence in the family.

D. How and When Should Cases Be Referred to a Settlement Process?

If participation in a settlement process will be mandatory, the court will need to decide how and when cases should be referred to that process. In courts where participation in these processes is voluntary, the court will still need to determine how and when to provide litigants with information about the settlement processes available to them through the court.

In most courts, the determination of whether to refer a case to a mandatory settlement process is made by the judge based on information provided by the litigants. For example, in California, litigants in general civil cases are required to provide the court with a case management statement that includes information about the case and the parties' interest in participating in various settlement processes (CRC 3.) The judge can use this information to assess whether referral to a particular settlement process is likely to be helpful. However, where participation is mandated in certain case types, referral may be automatic or may be done by court staff.

Because the costs of litigation, both financial and emotional, typically mount over time, it may be most helpful if litigants use settlement processes early in the life of a case. However, some litigants may not be ready or have enough information to settle their disputes at that point and settlement processes can be helpful at almost any point before trial. It may therefore be ideal to refer cases to settlement processes or provide information about settlement assistance opportunities at several points during the litigation process. Referrals can be made or information provided:

- At the time a case is filed;
- At the first case management or other conference at which a judicial officer reviews the case;
- At another court hearing;
- Shortly before trial; or
- On the day of the scheduled trial.

For example, many courts offer mediation early in the life of a case and also offer settlement conferences close to the time of trial.

As noted above, when litigants are referred a settlement process, it is important that the court help the litigants understand that settlement process, particularly if participation is mandatory. A very important

part of this is helping litigants understand that they are not required to settle their dispute in this process. As noted above, self-represented litigants may be particularly vulnerable to inappropriate pressure to settle, so judicial officers or others making referrals should make clear that in mediation or a settlement conference, the litigants decide whether and on what terms to settle and in court-annexed arbitration, the litigants decide whether to accept the arbitrator's decision.

E. Who Should Conduct the Settlement Process?

As noted at the beginning of this section, settlement processes can be conducted by variety of different people including:

- Judges – judges often conduct settlement conferences;

- Court staff – many child custody and visitation mediations are conducted by court staff mediators who have extensive experience and training as set out in CRC 5.120;

- Attorneys serving as temporary judges – courts often use staff or volunteer attorneys serving as temporary judges to conduct settlement conferences;

- Neutrals on a panel established by the court – California superior courts that have judicial arbitration programs are required to establish panels of arbitrators and many courts have established their own panels of mediators;

- Neutrals on a panel established by another organization – some courts contract with local bar associations or community dispute resolution programs to provide mediators; or

- Private neutrals selected by the litigants – some courts leave it up to the litigants to select their own private neutral.

There are pros and cons to each of these approaches:

- Judges – using judges as neutrals requires more judicial time, but litigants may appreciate judicial attention and feel more satisfied with their court experience;

- Court staff – it may cost the court more to use staff as neutrals and there are likely to be fewer neutrals to select from; however, this

approach gives the court a high degree of control over the quality of the neutrals, including over their skills with self-represented litigants;

- Court panel – having a court panel will provide a greater variety of neutrals that litigants can select from and the court can still exercise control over the quality of the neutrals by establishing qualification requirements. These requirements can include training focused on handling cases involving self-represented litigants;
- Non-court panel – this approach typically gives the court less ability to control the quality of the neutrals; the court has to rely on the expertise of the entity that created and maintains the panel;

- Private neutrals – the court does not have to expend resources on neutrals under this approach, but the court also has no ability to control the quality of the neutrals.

If a court is going to hire staff neutrals or maintain a panel of neutrals, it is important for the court to consider what characteristics or skills they want the individuals who will serve as neutrals to have and what practices they want the neutrals to engage in or not engage in. Recently a survey of attorneys was conducted to see what factors attorneys looked for in mediators.[50] These factors are likely also applicable to self-represented litigants and should be borne in mind by judges as they themselves promote settlement, evaluate potential neutrals, or make referrals.

1. Avoiding Pressure to Settle

A neutral should not measure his or her success in terms of the numbers of agreements reached. A basic goal of mediation and settlement assistance is to settle cases, but that is not its only purpose. No one, including judges, should put pressure on the mediator or settlement assistance provider or on the litigants to settle cases. Rather, the goal should be to improve litigants' abilities to make decisions about their disputes and to move their cases toward productive and timely final resolution. Both litigants and the court can benefit from partial settlement, bifurcation of issues for a more focused trial, or scheduling of pretrial status review conferences.

[50] J. Kichaven, "What Attorneys Want in Mediators and How to Provide It," *LA Daily Journal* (Aug. 14, 2006).

It should be remembered that inappropriate pressure could be far more harmful when a party is self-represented.

2. Integrity

Participants place a high value on honesty in the mediator and settlement assistance provider when assessing the fairness of the process. The ability of a settlement officer or mediator to keep a promised confidence or to make a report faithfully contributes enormously to the trustworthiness of the process. Studies on procedural justice report that when litigants have confidence in the judge's integrity, they are likely to regard the court process as fair regardless of the outcome.[51] Results suggest that this may hold true for other neutrals in settlement processes. It is important not to let pressure to settle interfere with this integrity.[52]

3. Knowing the Underlying Legal Subject Matter

Attorneys generally expect that the mediator or settlement assistance provider must be able to participate in an intelligent and informed conversation about the merits of the case. In designing a program for self-represented litigants, courts should be aware that litigants believe that settlements must at least come close to meeting some standard of fairness and therefore that they must be based in the law as well as underlying equity. When a self-represented litigant has not been given needed legal information prior to mediation or settlement, the mediator or settlement assistance provider will have to be ready to provide legal education and information.

CRC 5.120 requires that an orientation explaining the basic law regarding child custody and visitation be provided to all participants in court-connected mediation of these issues. It further requires that mediators receive extensive training on these issues to be able to provide information to litigants about a variety of options.

4. Avoiding Manipulation or Oversimplification

---

[51] T. Tyler, What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures (1988) 22 Law & Soc'y Rev. 103

[52] CRC 5.120(h) sets out the professional ethical standards for court-connected child custody mediators in these matters.

Discussions aimed at settlement should be forthright and should honestly discuss the issues in the case.

Weaknesses and strengths should not be over- or underemphasized.

Judges, staff, and neutrals should be careful not to confuse problems with language, lack of literacy, or low educational level with a litigant's underlying intellectual ability. They should remember that self-represented litigants can generally grasp legal concepts, at least when they are properly explained, and apply them to their own matters. They are frequently accustomed to dealing with similarly complex issues in other areas of their lives and are unlikely to respond well to intimidation, manipulation, or trickery.

5. Ability to Communicate

The ability to communicate clearly is perhaps the most important characteristic of an effective neutral.

Judges should remember that the most effective neutrals, particularly effective mediators, have the ability to share knowledge, to promote settlement, to reframe old issues, and to introduce new possibilities for consideration, and to do so with sincerity and honesty.

6. Being Prepared

The neutral should read the file or other paperwork to become familiar with the issues at hand. Being informed, prepared, and willing to get to the issues in a businesslike manner demonstrates respect for the litigants. In fact, CRC 5.120 (e) requires a review of the intake form and court file, if available is required for court-connected custody mediators.

7. Developing Case-Specific Approaches

To be effective, neutrals must develop case-specific approaches to work with the parties. One standard format or approach will not work with every type of case, or every litigant. For example, in mediation, with some litigants it will work best to meet together; for others it will be best to caucus; a combination might be most effective for others.

Each case will have its own specific needs that the neutral must analyze and understand.

8. Developing a Plan for Follow-up

Follow-up can be critical to reap the benefits of settlement assistance or to make sure that these benefits do not dissipate.

1. If the litigants reach agreement in a mediation or settlement conference, it is good practice for the neutral to follow-up to make sure that the agreement is memorialized in writing. A neutral may be able to assist the litigants by writing down the settlement terms the parties have agreed to or, at the request of the parties, assisting in resolving dispute over whether a written agreement accurately reflects the settlement terms. Some programs are structured so that the parties' agreement is entered with the court as an order or stipulated judgment.

2. If the litigants do not reach agreement in a mediation or settlement conference, there may be a need for an additional meeting or meetings; perhaps the litigants need to get more information or documentation, to talk to affected or respected parties, or just to take the time for reflection. Whatever the case, it is good practice for the neutral to reach agreement with the litigants on a plan for the next step and a schedule set so that everyone knows what is expected.

F. Location: The Courthouse Is Often Best

Generally, in most cases, the best place to work with self-represented litigants will be at the courthouse, at the time of some other court-scheduled event, as this is often the best time to get both parties together. The courthouse is also seen as fully neutral, safe, and accessible to communities in the area. In addition, performing the mediation at the courthouse makes it easier to take advantage of court-located services such as security (to keep the parties apart when needed), informational resources, and possible help in putting any agreement in writing and getting it properly filed with the court.

Unfortunately, many courthouses currently do not have adequate space to conduct mediation and other settlement services. While California's Trial Court Facilities Design Standards[53] call for space for such services as part of any future courthouse facilities planning, in the meantime, the court can explore conducting settlement processes at other locations in the community, such as at community dispute resolution centers or at the offices of the neutrals.

G. Confidentiality and Other Things to Consider

Other things that a court should consider in structuring a settlement assistance program include the confidentiality of the process and the availability of interpreter services.

It is important when establishing a settlement program and informing litigants about that program, that courts be clear about the confidentiality of the particular process. Litigants perceptions of the courts can be negatively affected if information that they think is confidential is subsequently revealed.

In general, California law specifically provides that offers of compromise, whether made in a settlement process or other context, are inadmissible to prove liability for the claim (Evidence Code 1152). In addition, quasi-judicial officers, arbitrators, and mediators, like judges, are incompetent to testify in any subsequent civil proceeding as to any statement, conduct, decision, or ruling occurring at or in conjunction with a prior proceeding except in very limited circumstances (Evidence Code 703.5).

In addition to these general confidentiality provisions, there are specific provisions concerning the confidentiality of certain settlement processes.

1. Mediation. California has a very strict confidentiality law that applies to mediation (other than child custody and visitation mediation, discussed below). Evidence Code sections 1115, et. seq. provide, among other things, that:

    - Statements made and writings prepared for the purpose of, in the course of, or pursuant to a mediation are not

[53] Judicial Council of California, *California Trial Court Facilities Standards* (adopted April 21, 2006); section 7.5

admissible or subject to discovery or compelled disclosure in noncriminal proceedings in which testimony can be compelled unless all mediation participants expressly agree to their disclosure. (Evid. Code, §§ 1119(a) and (b) and 1122(a)(1).);

- All communications, negotiations, or settlement offers in the course of a mediation shall remain confidential unless all mediation participants expressly agree to their disclosure. (Evid. Code, §§ 1119(c) and 1122(a)(1).);

- No one may submit any kind of mediator report, assessment, evaluation, recommendation, or finding concerning a mediation to a court or other adjudicative body, and a court or adjudicative body may not consider any such report, unless all parties to the mediation expressly agree otherwise. (Evid. Code, § 1121.)

- For a written settlement agreement prepared in the course of or pursuant to a mediation to be admissible, one of the following must occur: (1) the agreement must specifically provide that it is admissible or subject to disclosure; (2) the agreement must provide that it is enforceable; or (3) all the parties must agree that it is admissible. (Evid. Code, § 1123.); and

- For an oral settlement agreement made in the course of or pursuant to a mediation to be admissible, ALL of the following must occur: (1) the agreement must be recorded by a court reporter, tape recorder, or other reliable sound recording; (2) the terms of the oral agreement must be recited on the record in the presence of the parties and the mediator and the parties must express on the record that they agree to the recited terms; and (3) the recording must be reduced to writing and signed by the parties within 72 hours. Except in limited circumstance, the parties must also either expressly state on the record that the agreement is enforceable or binding or subsequently agree to disclosure of the agreement. (Evid. Code, §§ 1118 and 1124.)

It is important that courts that establish mediation programs structure their programs with these statutory limits in mind. In particular, it is important that judges not expect or request that

litigants or mediators inform the court about what happened in the mediation.

2. Child custody and visitation mediation - Under California law, a court may provide by local rule that mediators conducting the statutorily mandated child custody and visitation mediations make recommendations to the court when agreements are not reached in mediation. (Family Code 3183.) These child custody and visitation mediations are specifically exempted from the general mediation confidentiality law (Evid. Code, § 1117(a)(1)). Mediators conducting these mediations are also exempt from the general rule that mediators are incompetent to testify (Evid. Code, § 703.5(a)(1)).

3. Judicial arbitration – Any reference to the judicial arbitration proceeding or award during a subsequent trial constitutes an irregularity in the tral and may require vacating the court's decision (Code of Civil Procedure §§657, 1141.25)

Another important issue that courts should consider in structuring a settlement program is providing interpreter services. It is key that an interpreter is available if a litigant in a settlement process is non–English speaking or limited-English speaking. It is one thing to be able to speak English in everyday life and another to be able to proceed effectively in a court case.

H. Judicial Review of Settlement Agreements

This is an area in which settlement programs may vary depending on the type of case being handled. In some types of cases, such as those involving child custody and visitation or the compromise of a minor's claim, the judge must approve any settlement reached, whether with represented or self-represented litigants. In other types of cases, such as general civil cases, judges typically do not review, and may often not even see, settlement agreements; the parties simply dismiss the pending civil case when they have agreed to a settlement.

In those types of cases in which judicial review is required, the judge's role generally includes ensuring the legal sufficiency and basic fairness of any agreement reached in a settlement process. The purpose of the judge's review is not to "second guess" the wisdom of the litigants'

agreement or to restrict in any way the wider array of solutions available to them by way of settlement. Rather, it is to minimize the opportunity for inadvertent procedural omissions or mistakes and to reduce the risk of oppressive, fraudulent, or unconscionable advantage being taken by one side over the other based on lack of representation, or other potential threat such as in cases of domestic violence. In these cases, the judge is the final protection to ensure the fairness of the agreement for the self-represented litigant. This is true regardless of whether the judge actually hears the case, or whether he or she takes responsibility by signing the agreement formally entered into by the parties.

When conducting any review of a settlement agreement, judges should keep in mind the applicable confidentiality laws. For example, judges should keep in mind that, except in child custody and visitation mediations, neutrals are generally not competent to testify about what happened in the settlement proceedings and judges should therefore not request or permit parties to request such testimony. Judges should also not ask parties to reveal communications that took place in such mediations.

1. Courtroom Review of Settlement Agreements

When agreements are reached through a settlement process that occurs in a judge's courtroom, the litigants may be available for voir dire and review if the judge so desires. The judge can easily review the agreement and examine the litigants if there is a question as to the legality of the agreement, or whether one or the other of the parties has entered into the agreement knowingly and understands the agreement and any rights that party may be waiving.

2. Review of Agreements Entered Outside the Courtroom

When an agreement between self-represented litigants is crafted outside the courtroom and submitted to the judge in writing without the parties available for voir dire, the situation changes. Then the judge must decide to what degree he or she will scrutinize the agreement between the litigants, and whether to sign a stipulation which includes terms that are clearly egregiously unfair to one side or the other. For example, a properly notarized marital settlement agreement between two self-represented litigants arrives along with a judgment in a judge's chambers for signature. The parties have awarded the vast majority of the community assets to the husband

and mutually waived spousal support; however, the case file reveals a history of domestic violence against the wife. Many judges might find this set of facts disturbing enough to prevent them from signing the judgment. If so, the judge might elect to notice the parties in to voir dire them on the record or to send them to the self-help center, if available, for assistance and referral to some community-based assistance. If the court has a specialized domestic violence calendar with community support available, the voir dire hearing can be set on that day.

Note that in those cases in which the judge will not be reviewing the parties' settlement agreement, it becomes doubly important that the court provide self-represented litigants with information and assistance to effectively participate in the settlement process, as discussed below.

III. Providing Information to Litigants to Encourage and Support Participation in Settlement Processes

A. The Information Challenges Facing Self-Represented Litigants

As noted at the beginning of this chapter, just as they do in the regular litigation process, self-represented litigants face certain challenges in settlement processes.

1. Self-represented litigants often lack an understanding of their legal rights and obligations as well as of legal procedures. They often find it difficult to articulate their positions and may not be able to recognize settlement terms that inadequately protect their rights and interests. Thus these litigants will need legal education to participate in settlement processes. Those working with self-represented litigants to provide this education should have a high level of professional legal expertise in the subject matter.

2. Self-represented litigants may not be able to negotiate settlement terms that adequately protect their rights and interests. Often the parties may have significantly varying levels of power within a case. Neutrals must know how to handle this discrepancy in power during the settlement process.

3. While the concepts of mediation and settlement are not difficult if explained, the role of the neutral and the process of achieving settlement in court cases are not always obvious. It is important that self-represented litigants be informed about the role of the neutral as separate from the judge. The neutral is not the decision-maker. The litigants have the right to disagree and to know that not settling their case is not a sign of disrespect to the court.

4. Because they have little basis for comparison, self-represented litigants often have unrealistic expectations of both the litigation and the settlement process. They may therefore ask for levels of service from neutrals that cross the line to representation. They may expect, for example, that the neutral will advise them which option to choose, which would impermissibly cross the line over into legal advice.

B. Information About Settlement Assistance Options

To encourage and support self-represented litigants in participating in settlement assistance processes, it is important that they be provided with information about the settlement processes that are available through the court and in the local community. This includes information about:

- The basic nature of the settlement process(es), including the roles and responsibilities of the neutral and the parties, how the process typically proceeds and the confidentiality of the process;

- The fact that parties are not required to settle their cases in these processes; and

- If the parties are responsible for selecting the neutral, information about how to do this.

This information can be provided in a variety of forms, including:

- Brochures or other written materials;

- Videos that demonstrate various settlement processes;

- Web-based information, which can include both written materials and video vignettes;

- Oral explanations of these processes, either in a group setting or individual basis.

As discussed above, information about settlement assistance available through the court should be provided to litigants as early in the litigation process as possible and throughout the life of a case, whenever participation in a settlement process can be ordered by the court or voluntarily agreed to by the parties,

1. Clerk's Window. Litigants can be provided with information at the time papers are filed, or information can be included with papers as they are served. For example, California courts are required to provide information about alternative dispute resolution (ADR) to plaintiffs in general civil cases when actions are filed, and to serve such information on defendants along with the other papers being served. (CRC 3.221-3.222.) This includes information about available court and community ADR programs and who to contact in the court for additional information.

2. ADR Administrator or Other ADR Staff – Each California superior court is required to designate an ADR Administrator who is responsible for various aspects of administering the ADR programs that the court offers for general civil cases. The duties of the ADR Administrator or other ADR staff may include meeting with litigants to discuss settlement process options and providing information other sources of about the court's programs to litigants.

3. Self-Help Center. If the court has a self-help center, information about mediation and settlement assistance and procedures might be obtained there. Many self-help centers also provide mediation and settlement services or help prepare litigants to participate in mediations or settlement conferences.

4. The Courtroom. Information about settlement assistance options can be provided by judicial officers directly from the bench. However, as noted above, it is important to be sure that the litigants are clear about what is happening,

understand the process, and understand that they are free not to settle. Self-represented litigants may be particularly vulnerable to pressure to settle, especially when it comes from an authority figure such as the judge. It is critical that litigants not perceive this process as a way to deprive them of their "day in court."

C. Helping Litigants Prepare to Participate in Settlement Processes

As noted above, self-represented litigants may need assistance to participate effectively in settlement processes, although probably less than they would need to effectively participate in a trial. To effectively negotiate, they may need help understanding the laws that apply in their case and the potential outcomes if their case goes to trial and how to present these in a settlement process. If the court is going to provide settlement assistance services to self-represented litigants, it is very important that the court build a system for providing this assistance into its settlement program.

As with information about settlement processes, this assistance can be provided in a variety of forms, including:

- Pamphlets or other written materials that provide basic explanations about the law in particular areas, such as evictions or debt collection;

- Web-based information, which can include pamphlets or frequently asked questions. California's online self-help center has a great deal of this type of information to assist self-represented litigants;

- Oral presentations concerning the law and procedures, in group or individual settings; and

- Individualized assistance in how to present a litigant's position in a particular case.

The same types of resources identified in Chapter 5, that may be available to assist self-represented litigants to prepare for and participate in the litigation process may also be appropriate resources for self-represented litigants preparing to participate in a settlement process. Available resources may include:

- Family Law Facilitators;
- Court self-help centers;
- Small claims advisors;
- Volunteer attorney programs;
- Legal services programs;
- Law school clinics; and
- Local bar association programs.

Some courts, particularly those that do not have self-help centers, may also want to look to the neutral to provide self-represented litigants with needed legal information. This approach is used for court-connected custody and visitation mediation and many family law settlement assistance programs. This usually includes an orientation regarding the law and providing information to the litigants about their situation if appropriate as the mediation progresses.

The benefit to this approach is that the self-represented litigant can more effectively participate in the settlement process by knowing about reasonable outcomes and can get needed services in one step, making the whole process easier on the litigant and potentially preventing an unfair result. However, this approach may be less desirable than providing a separate source of legal information and assistance to self-represented litigants.

Relying on neutrals to provide legal information may raise competency and role-confusion concerns, particularly in the mediation context. While it is generally permissible for mediators to provide information that they are qualified by training or license to provide, not all mediators are attorneys. Non-attorney mediators may not be qualified to provide the type of legal information that would prepare a self-represented litigant to negotiate. A court might try to address this issue by using only attorney neutrals, but attorney neutrals are often concerned that, if they provide legal information, it increases the likelihood that self-represented litigants will become confused about the neutral's proper role and think that the neutral is representing them. Thus, if they are required to be the source of legal information, some attorney neutrals will be reluctant or unwilling to handle cases involving self-represented litigants. Judges can try to mitigate these concerns by explaining the role of the neutral to self-represented litigants and emphasizing that the neutral will not be advising or representing any party. This may not allay all of the neutrals' concerns, however, and judges will most likely need to weigh the potential benefits of having legal information provided by the neutral with the

difficulty that placing this responsibility on neutrals may create in recruiting and retaining neutrals.

IV. Examples of Settlement Assistance Programs for Different Case Types

Optimum settlement processes and procedures may vary with the type of case. The following are examples of settlement assistance programs set up by some courts for particular types of cases.

A. Family Law

1. Courtroom Settlement Assistance for Family Law Motions. Many judges have found that having court-based self-help attorneys or volunteer attorneys present in their courtrooms to assist self-represented litigants with settling their motions is routinely effective in reaching agreements.

   Typically, issues to be resolved include matters related to children, spousal support, temporary use of property, and debt payment. Clustering cases with self-represented litigants onto specialized calendars generally allows the judge to make the most efficient use of the attorneys' time. If the litigants come to an agreement, the attorney writes the agreement into the form of a stipulated order for signature by the judge. If an agreement cannot be reached, the attorney helps the parties identify areas of agreement and narrows the issues to be presented to the judge for hearing. Once the hearing has been completed, the attorney can prepare the court's written order after the hearing.

2. Courtroom Comprehensive Settlement Assistance. Some judges have expanded the scope of their courtroom settlement services. Judges refer litigants to work with the attorneys toward settlement of all issues in the case. If complete settlement is not possible, the case is moved as far along the process toward judgment as is realistic for that day, and follow-up scheduling is established. Orders will be made on all issues before the court that day, and all other issues the parties can agree on.

3. Settlement Conferences. Several courts have implemented settlement conference services for self-represented litigants as part of a caseflow management process in family law. Litigants

are given notice of a settlement conference date at some point in the process. Some courts notice litigants of that date at the time the initial papers are filed, some when responsive papers are filed, and some when cases are set for trial. The time from initial filing to the time for the settlement or status conference also can vary—usually from 30 to 180 days from the initial filing of the case. Qualified family law attorneys, either from the courts' self-help center or volunteer attorneys from the local bar, conduct settlement discussions. The discussions address all issues in a case. If agreements are reached, judgments can be entered the day of the conference. If not, further settlement meetings can be scheduled or trial dates set. If trial dates are set, the attorney can help the parties organize documents, prepare joint trial statements, and assist them in preparing to present their issues to the judge.

4. Settlement Conference Calendars. Where both parties have made appearances in the case, litigants are noticed to appear before court for a settlement conference. The judge conducts the settlement conference. If settlement is not reached, the case is scheduled for further conferencing or set for trial.

B. Landlord/Tenant

One court has developed a two-tiered model that clearly recognizes the need for self-represented litigants to be prepared to participate in the settlement process.

1. Preparation. Attorneys from the court self-help center offer twice-weekly workshops for self-represented tenants and on-call services for self-represented landlords to educate them about the settlement process, potential options, jury instructions, and the need to go to trial if no agreement is reached. Stipulation for judgment forms and jury instructions are discussed. This is a stand-alone workshop. Follow-up assistance is provided if litigants do not settle their cases and must proceed to trial.

2. Settlement Conference. Attorneys conduct the settlement discussions between the self-represented litigants. These are not the same attorneys who provide the preparation assistance. In this model, attorneys who conduct the settlement conferences are from local legal services programs. Agreements can be beneficial to both sides of eviction litigation. For example, a

landlord may get a date certain for restoration of the premises and a payment plan for back rent; and the tenant may get some additional time to find new housing. The parties may even be able to agree to lodge the stipulation with the court so that the case can be dismissed if the premises are vacated in good shape as promised, relieving the tenant of an eviction record.

C. Small Claims

Mediation and settlement discussion for self-represented litigants can be productive in small claims matters, particularly in light of the difficulties related to collection of judgments.

1. Court-Based Mediation. Some courts operate in-court mediation programs for small claims court matters. The judge can refer litigants to the mediator at the time of the hearing. If no agreement is reached, either a further mediation session can be scheduled or the hearing can be held. Mediators from community mediation programs, court self-help attorneys, volunteer attorneys, or local legal services most frequently conduct court-based mediation.

2. Community-Based Mediation. Frequently, judges refer small claims litigants to mediation at community-based dispute resolution programs. When this occurs, new court dates should be scheduled fairly promptly in case no agreement is reached. The judge should make it clear that there is no pressure for the parties to agree. Mediation should not be perceived as an obstacle to their right to a hearing.

V. Providing Information to Judges and Court Staff

A. Intracourt Communication

Whatever settlement process the court chooses to provide, it is important that each part of the court know what the others are doing. For example, judges need to know what settlement services are available at the self-help center, what cases are being handled, and at what times. A self-help center needs to know if judges are expecting staff to be providing same-day settlement services to litigants so that planning to provide such on-demand services can be made. Clerks

need to know what specific types of settlement services are offered at the courthouse, at what point in the court process they occur, what preparation might be required, and what assistance is available.

B. Community Resources Lists

The court should maintain a complete and updated list of community resources available to self-represented litigants for settlement services. This list should include information on contacts, areas of expertise, language in which services are offered, any special cultural competencies, eligibility requirements, and cost of services, if any. The court may be able to obtain much of this information from the coordinator of the county's dispute resolution programs act (DRPA) coordinator.

C. Evaluation of Programs

In order to ensure that settlement services meet the goals set out this section, it is often helpful to provide for an evaluation of the services. This can include interviewing or surveying litigants to get feedback about their experience.

Conclusion

Settlement assistance processes have become a key part of the options that courts use to help resolve cases. These processes can be particularly helpful in self-represented litigant cases, because they are typically simpler, less formal, and easier for self-represented litigants to understand and navigate.

However, courts need to be aware of the challenges self-represented litigants face when the courts are designing and implementing their settlement programs. It is critical for courts to keep in mind that self-represented litigants may not come into the settlement process with enough information about their legal rights and the potential outcome of their dispute in court to meaningfully negotiate with the other side and make reasoned decisions about whether and on what terms to settle. These litigants may also be particularly vulnerable to pressure to settle, which could leave them feeling that they were denied their "day in court," and feeling dissatisfied with the court system as a whole. Courts should structure their settlement programs so that self-represented litigants are provided with necessary information about

both the settlement process and about their legal rights so that they can effectively participate in settlement processes. Judges, court staff, and neutrals should also avoid placing pressure on litigants to settle cases.

Chapter 8: Special Due Process Considerations

8

Special Due Process Considerations

Introduction

All people are guaranteed due process of law under both the United States and the California Constitutions.

One of the paramount due process values is notice—notice of charges or claims, notice of proceedings, notice of filings, and notice of information that the court will consider in acting on a case—and the opportunity to act on this notice.

Court procedures have been carefully established to guarantee that parties to court proceedings receive from the court and from other litigants the notice to which they are entitled and also that they are given the time to act on this notice, as appropriate.

This chapter explores the interplay between these and other due process rights, and the needs of self-represented litigants.

I. Problems With Self-Represented Litigants Getting and Giving Notice

Special challenges exist in making sure that self-represented litigants both receive the notice to which they are entitled and give the notice to opposing parties to which those parties are entitled. Some of the factors behind these challenges include the following:

1. Self-represented litigants generally do not know the rules about what information can be shared, what must be shared, what must not be shared, and when such sharing must occur;
2. Self-represented litigants are generally more difficult to contact than attorneys by fax or e-mail with reports and other documents that need to be received shortly before a hearing;
3. Professionals assisting the court as mediators, investigators, and researchers are often reluctant to contact a self-represented litigant directly with information that they would provide to an attorney as a matter of course because they are concerned about the potential response of the litigant to that information;
4. Self-represented litigants are unfamiliar with the procedures required to subpoena and cross-examine witnesses, and to explain or refute information in documents of which they have been given notice; and
5. Self-represented litigants often have multiple cases pending before different judges or court divisions and thus might reasonably expect that these courts would be automatically aware of the issues in a litigant's different cases, even when the courts are not so informed. Another type of problem that can occur in multiple case situations is when judges inadvertently rely on information from another court case file without the party's knowledge or opportunity to respond to that information.

II. Problems With Ex Parte Communications to the Court

Ex parte communications can occur inadvertently when judges and other court staff are in close contact and are working hard to process cases efficiently and in the best interest of the litigants. For example:

1. A family court services mediator or probate investigator may speak about his or her interaction with the litigants with the judge in chambers or another location where the parties are not present and are unable to comment.

2. A court-based self-help attorney or paralegal may provide a judge with information about the financial issues with respect to child or spousal support outside the presence of the parties.

3. A clerk in a domestic violence court may provide the criminal court judge with a record of related cases that includes information from a juvenile dependency case. This information is not made available to the litigants because of the confidential nature of the dependency case. There is no chance to object to the information or to respond to it in any way.

Self-represented litigants are less likely to discover that such ex parte communications have occurred, are less likely to know how to challenge them when they have occurred, and are less able to rebut inappropriately communicated information. It is also possible that opposing attorneys and even court staff may be more likely to initiate ex parte communication when they know that the self-represented litigant is not in a position to prevent this from happening.

The responsibility of courts to "self-police" in such situations is therefore particularly high.

III. Problems With Information in Internal Court Systems

Given the increased amount of information available in computer systems and through case managers, judges may be presented with information not developed by the litigants or their attorneys. Moreover, even when litigants are aware of the information and can respond to it, some kinds of information can create substantial risk of undue prejudice and confusion of issues, and can potentially mislead the trier of fact. (Evid. Code, § 352.)

1. Criminal history information (rap sheets) obtained by a domestic violence court coordinator. For instance, a Family Code section 6306(a) search of criminal history may reveal that a respondent in a domestic violence matter is on probation for possession of a controlled substance. Does this make him or her any more likely to have committed domestic violence in the judge's mind? How will the court give the parties notice that the information has been

received and considered by the judge in a manner that provides a reasonable opportunity to respond to it? Who will have access to this information?[54]

2. Information about cases involving people or incidents that are remote in time, relationship, or nexus to the issue before the court. For instance, a mother has a current dissolution with a contested custody issue. The court's case manager has located a previous paternity case in which this mother had been involved in a custody dispute over two children with another man. In that five-year-old case, there was a child custody evaluation recommending that the children be in the primary custody of their father. Should a judge see and be influenced by the previous evaluation in the older case? If so, how will the parties be notified that this evaluation is being considered? Who should have access to the evaluation? How will the case be set for hearing in a way that allows time for self-represented parties to respond to this information?

3. Information in current cases that may prejudice a judge unfairly on a particular issue in a related but different case. For instance, a woman has filed for dissolution and set a hearing to ask for custody. The judge is aware that she is also the defendant in an eviction case in which the basis for eviction is loud parties in violation of the lease. Should the judge be influenced by this information in making the decision about custody in the current dissolution case? How will the court bring the matter to the attention of the parties?

IV. Procedures to Minimize Risks of Due Process Violations

Since attorneys are not available to raise concerns and objections about due process in all such types of situations, judges should be

[54] Family Code section 6306(b)(2) provides that the court must not consider any information obtained as a result of the search that does not involve a conviction described in Family Code section 6306(a). That information must be destroyed and must not be a part of the court file or any civil case file.

especially mindful of due process in cases involving self-represented litigants. Litigants—just like attorneys—must be informed of ALL the information that the judge will be using to make a decision and must have sufficient time to review the information to be able to raise concerns about its accuracy and probity and to rebut it.

Many of the institutions designed to provide information to the court are overburdened. Judges need to be aware that there may well be factual errors in reports—or that terms may be used that are imprecise or inappropriate. In addition to time to review the reports, litigants must be given the opportunity to raise questions at the hearing and present evidence to rebut the report.

Judges can also encourage reporting professionals to review their reports with self-represented litigants before submission, thereby providing the opportunity to correct and rebut. In one county, the common practice is for the child custody mediator to review the materials in the custody evaluator's report with the self-represented litigant. The review is intended to ensure that the litigant understands it, that errors are corrected, and that the litigant receives from the mediator perspective on how the information will be considered.

Formal written protocols can help set the boundaries for communications among judges and between judges and court staff on substantive matters (those that go beyond calendaring or other nonsubstantive procedural issues). The following protocols and procedures are helpful:

1. Written policies for communications among judges, between judges and court staff, and between judges and other government workers such as probation officers, social workers, and child support enforcement attorneys and staff, about any substantive matters related to litigants.

2. A standard procedure whereby all communications to judges about substantive matters related to cases must be in writing and be provided in advance to all parties.

3. A standard procedure whereby litigants are given the opportunity to question a person making a report about its content, to question anyone whose hearsay statements or opinions may be contained in the report, and to offer evidence with respect to it. Reports should contain contact

information for those whose input has been considered in the report so that the litigants may have the opportunity to bring these individuals to court for questioning.

If the court intends to review any documents not submitted by the parties such as docket sheets or computer printouts about related cases, notice should be given to the parties indicating which specific documents are to be reviewed, and copies of these documents must be available to the parties in a timely fashion so that they have the opportunity to be heard if they object.

Sometimes forms are marked as “confidential,” thereby creating in the litigants an expectation that the information they provide will be kept private. Litigants must always be informed of the limits to this confidentiality. Examples include family court services reports and recommendations as well as probate investigator reports and files.

It is important to inform litigants of their legal rights against self-incrimination. Judges may also want to consider taking precautions against eliciting potentially self-incriminating information, or other information against a litigant’s legal interest, in cases where there are, or are likely to be, criminal charges. Training for court staff is also helpful on issues such as limitations of confidentiality of communications with litigants and on evidentiary privileges relevant to the types of information common to cases involving self-represented litigants (e.g., public information, medical records, mental health information).

Conclusion

To protect due process rights of self-represented litigants, judges and court staff must remain alert to the particular enhanced risks that these litigants face and must implement systematic protections to minimize these risks. They also need to make use of this same sensitivity as they obtain information and act on it in individual cases.

Chapter 9: Communication Tools

9

Communication Tools

Introduction

Communication is the foundation of all our interactions with others. It influences how we perceive and judge not only other people but also the facts and circumstances of cases. The court system rests heavily on the communication skills of its various participants. This chapter surveys the communications challenges facing judges in cases involving persons representing themselves. It describes techniques that judges can use to get the information they need to make appropriate decisions and to convey those decisions in ways that are more likely to result in compliance.

I. Communication Challenges With Self-Represented Litigants

Under the time pressure and stress of heavy and intense calendars, judges must determine how they can best perform their fact-finding and decision-making functions when the involved parties are not legally trained or familiar with courtroom culture. Judges have to decide how to make sure that parties who do not have attorneys as intermediaries nonetheless understand and comply with the court's orders and rulings. How can a judge make sure that justice is not more difficult to attain for self-represented litigants than for those with counsel?

A judge's communication skills—something that *everyone* can improve—will help determine success in this endeavor. A judge's communication choices will influence not only the amount and quality of the information successfully conveyed in the courtroom (both information given and information received) but also the likelihood of

compliance with court orders and, ultimately, both the actual and perceived fairness of the court proceedings.

Good communication also involves being aware of those persons in the courtroom who are waiting for their cases to be heard. Through "teachable moments" the bench officer can draw the audience's attention to the cases being heard, increasing their comprehension of the process and the ability of persons in the audience to work within the process when their own cases are called.

Verbal communication refers to the words used, either written or spoken. *Nonverbal* communication is everything communicated except the words. It includes vocal elements—how something is said—as well as what is commonly called "body language." Listening, of course, is another basic element of communication, one that usually combines both verbal and nonverbal communication.

Communication between the judge and self-represented litigants will necessarily involve the content of actual words spoken or written, how those words are conveyed, and listening or reading skills. Word content can be general or specialized (e.g., "legalese"), formal or informal, and high- or low-grade-level equivalent, and the context within which words are conveyed can increase or decrease the likelihood of their comprehension. Nonverbal communication can be even more significant than verbal communication, and listening may be the most used but least taught communication skill.

II. Word Content, Formality, and Overall Language Level

A. The Importance of Understandable Terms and Definitions

In all cases, especially those involving self-represented litigants, it is important to try to make sure that the information and ideas conveyed are understood by listeners, whether those listeners have a law degree or not. Consider the terms used. Obviously, judges must be able to use and understand legal vocabulary, but they do not *always* have to use it. Using the specialized language of a profession can be a good shortcut if everyone understands it, but it is not a good shortcut if the listener does not understand it.

When there is no alternative to the use of a specific legal term and there is a possibility that the parties may not understand it, it is helpful to briefly explain the term. It is not necessary to sound erudite in order to sound professional and to have the record hold up on review. On the contrary, adapting to the listener is a hallmark of an effective communicator in any field. And it is essential in dealing with self-represented litigants.

Most professionals are not aware of how specialized their language is. When professionals think back to law school or to any time that they were introduced to a new area of law, some terms that might have seemed incomprehensible at first are probably now second nature. Like most professionals, judges tend to think in the "terms of art" of their profession, some to the point where they cannot "translate" legal terms except by using more of them.

Here are a few commonly used terms and their possible nontechnical equivalents:

1. alleged—claimed
2. appellant—a person who asks a higher court to reverse (or change) the findings of a lower court
3. bears a significant resemblance to—is like
4. in compliance with—comply, follow
5. the court—the judge
6. defendant—the person who is accused or sued
7. effectuate—cause
8. entitlement—having rights to particular benefits
9. evidence—what is used as proof to establish facts, including testimony from the parties, testimony from witnesses, or exhibits (documents or other objects)
10. exhibit—documents or other objects produced in court as evidence (proof)
11. hearsay—the report of another person's words; a statement, either oral or written, by a person who is not in court as a witness
12. jurisdiction—the right to decide a case, the official power to make legal decisions and judgments about particular cases
13. legal elements—the components or factors that need to be proved legally
14. litigant—a person involved in a lawsuit
15. make contact with—see, meet, talk to
16. moving party—the person who asked the court to make a decision

17. obtain relief—to receive a court award of damages or an order requiring the defendant to do or not do something
18. the parties—the sides
19. petitioner—the person who asked the court to make a decision
20. plaintiff—the person who brings a case against another in a court of law
21. the proceeding—the action taken in court, what's happening in court
22. prove the elements—demonstrate the truth or the existence of the necessary components
23. provisions of law—law
24. pursuant to—under
25. respondent—the defendant in a lawsuit, someone who has to respond to or answer the claims of a person who asked the court to make a ruling
26. rules of evidence—the rules for what is considered evidence or proof in a court of law, and how that evidence must be presented
27. sufficient number of—enough
28. under oath—sworn to tell the truth
29. weight—importance

Many judges find it useful to think through common questions to ask them in a way to make it more likely to get better information.

Does the matter stand submitted?
Do you have anything else to say before I make my ruling?

Did you cause to be filed?
Did you file?

Do you want a continuance?
Do you want to have this hearing at a later date?

B. Formal Versus Informal Speech

To communicate better with self-represented litigants, many judges find it helpful to use practices common to informal spoken language even in the more formal environment of the court.

Less formal language includes the use of the following:

1. Contractions—"it's," not "it is";
2. Shorter sentences;
3. First and second person—"I," "we," and "you," not third person (e.g., "one");
4. Active voice—"You need to understand," not passive ("It should be understood"); and
5. Informal connectors to open a sentence—"And," "Now," "Then," "Because," not "Additionally," "At this point in time," "Subsequently," "In light of the fact that."

C. Language Level as a Barrier, a Diagnostic Tool, and a Solution

Judges should be aware of the level, or grade equivalent of language, and adapt it so that it is accessible to listeners, without being condescending. Most commonly used software programs have measures for assessing the grade level of a document. Measures such as the Flesch-Kincaid Grade Level Score, which is included as a tool in Word and WordPerfect, include the word length (how many letters), sentence length (how many words), sentences per paragraph, and use of the passive voice. Using these tools can be very helpful.

D. Value of Written Materials

Some information is best provided in written form. When information is complex or lengthy, a handout—ideally with oral summaries or a question-and-answer session—reduces pressure on the listeners and makes it more likely they will both receive and process the information. Some written material is best provided before the court proceeding (e.g., by the clerk, through Web sites or self-help centers), which will greatly increase the likelihood that both sides will be better prepared.[55] By being in writing, it also allows for multilingual translation and gives litigants the opportunity to obtain help to understand the materials. Some information is important enough to be conveyed in both written and spoken form.

[55] Albrecht et al., p. 45.

E. Recognizing the Literacy Barrier

However, judges must always remember that as a practical matter, information given in written form is inaccessible to many of the self-represented.

It is estimated that over 2 million native English speakers in California are functionally illiterate,[56] which is defined as being unable to read, write, and communicate in English at a level necessary to function on the job and in society. The Correctional Education Association estimates that 65 percent of adult prisoners are functionally illiterate.[57]

In *Judging for the 21st Century: A Problem-Solving Approach*, Justice Paul Bentley (Ontario Court of Justice, Ottawa, Canada) has written that

> judges must learn to recognize and read the signs of low literacy. People may try to hide literacy problems by:
>
> - Saying they cannot read a document because they forgot to bring reading glasses;
> - Claiming to have lost, discarded, forgotten to bring, or not to have had time to read documents;
> - Asking to take home forms to "read later";
> - Claiming to have a hurt arm and are therefore unable to write;
> - Glancing quickly at a document and then changing the subject, or becoming traumatized, quiet, or uncommunicative when faced with a document;
> - Hesitating when asked to read a document and/or reading it excessively slowly; or
> - Appearing to read a document very quickly, although they are unable to summarize its contents."[58]

---

[56] S. White and S. Dillow, *Key Concepts and Features of the 2003 National Assessment of Adult Literacy* (National Center for Education Statistics, U.S. Department of Education, 2005); L. Jenkins and I. Kirsch, *Adult Literacy in California: Results of the State Adult Literacy Survey* (Educational Testing Service, 1994).
[57] A. Bazos and J. Hausmann, *Correctional Education as a Crime Control Problem* (UCLA School of Public Policy and Social Research, 2004), p. 28.
[58] P. Bentley, *Judging for the 21st Century: A Problem-Solving Approach* (National Judicial Institute, Canada, 2005).

Possible markers of low literacy include the following:

1. A person who has not completed high school or has difficulty speaking English;
2. A person who has filled in a form with the wrong information or has made many spelling and grammatical errors;
3. A person who claims to go to legal aid every day, but states that he or she doesn't have time to fill in the relevant forms;
4. A person who seems not to relate to or understand questions about particular times, dates, and places;
5. A person whose writing and speaking styles don't match; or
6. A pre-sentence report that indicates that an individual left school at a young age or before completing grade 10, or that chronicles a history of unemployment or refusal of job training, promotion, or reassignment.

Persons who have limited literacy skills may attempt to cope with feelings of fear, embarrassment, or inadequacy by behaving in ways that can appear flippant, dishonest, indifferent, uncooperative, belligerent, defensive, evasive, indecisive, frustrated, or angry. These emotional markers of low literacy may appear on the surface to be markers of a "bad attitude."

F. Overcoming the Literacy Barrier

To address low literacy in the courtroom, judges can do the following:

1. Be aware of their own biases relating to low literacy – remember – low literacy does not equal low intelligence.
2. Educate themselves about low literacy in their community and in the courtroom;
3. Make it easier for people to understand by
    a. Slowing down,
    b. Doing as much orally as possible,
    c. Speaking clearly and repeating important information,
    d. Supplementing oral information with a written note that the person can mull over in private or have someone read later, and

e. Previewing or reading aloud documents in the courtroom;

5. Keep literacy in mind when sentencing; consider literacy training as part of rehabilitation; keep in mind that most rehabilitative programs (job skills training, anger management, substance abuse, spousal abuse, etc.) are literacy based; or
   a. Use plain language instead of "legalese,"
   b. Use short sentences and clear language,
   c. Use words consistently,
   d. Use the active voice, and
   e. Avoid strings of infinitives ("authorize and empower").

III. Increasing Listener Comprehension

Various techniques have been shown to increase a listener's comprehension of verbal information.

A. Setting Ground Rules

It is far easier for people to follow the rules when they know what they are. For example, courtroom protocol includes wearing appropriate clothing, standing when the judge enters the courtroom, not interrupting, and so forth. These ground rules may be available in written form at different steps in the process such as at the clerk's office, self-help centers, or legal services offices. They can also be conveyed by a court clerk, self-help center staff, or bailiff. Procedural examples include how to state objections and how to present different types of evidence.

B. Providing a Mental Map

It is helpful to give court participants a "mental map" of what's ahead—what will take place. After each major stage, judges should let them know where they are in the process and what comes next.

For example, the following statement could be used: "The first thing I need to find out is whether this court has jurisdiction—that is, the court's power to decide this case. Then I need to find out whether the financial situation of the parent who does not have custody has

changed, and if it has, I need to decide what change in monthly support would be appropriate."[59]

Some judges use visual aids to supplement understanding such as the PowerPoint presentation in the appendix.[60]

C. Using Repetition

Given that this is often new information to self-represented litigants, it can be helpful to repeat important information. As mentioned above, judges will want to consider having important information in both written and spoken form. It is helpful if the same information is also conveyed to litigants at all steps in the process so that the clerks, self-help center staff, and court are providing consistent information to litigants.

D. Using Paraphrasing

It is often productive to ask court participants to paraphrase important information out loud in their own words to check their understanding. This will also increase retention.

This example combines explanation and paraphrasing: "You are required to sign a piece of paper promising the court to do certain things. If you do not keep your promise, the consequences are . . . Are you clear what you need to do? What is that?"

E. Asking Questions to Clarify Comprehension

Frequently ask if court participants have questions, and PAUSE—for at least 5 seconds for fairly basic questions and at least 8–10 seconds for more complex ones. Make sure that participants understand that it's okay to have questions.

1. Count to yourself if necessary to make sure the pause is long enough to allow listeners to process your question and formulate their own.

[59] Adapted from Albrecht et al., p. 46.
[60] Zorza, p. 23.

2. Use nonverbal behaviors to show that you are open to questions. Include some of the following: establish eye contact, pause, sit up straight or lean forward slightly, tilt your head a little to one side, use a nonthreatening vocal tone, gesture with open hands.

3. Watch the listener's nonverbal cues to see if he or she has questions but is hesitant to ask them. This is especially important for people who speak English as a second language or others who might be confused or intimidated by the surroundings and the process.

4. Answer likely questions even if your listeners don't ask them, if you think the information is important. "A question people often have is . . ."

IV. Nonverbal Communication

A. Cultural Context of Nonverbal Communication

Anytime oral communication is involved, nonverbal communication is a factor. Even when the judge is not speaking, he or she is still communicating nonverbally. Indeed, nonverbal messages can be more significant than verbal ones. They cannot be avoided, they vary with background and culture, and they are often difficult to interpret.

Within the courtroom setting, nonverbal communications reflect the relationships between various pairs of participants, build confidence and trust in the judge and in the process, and help maintain courtroom traditions. Consciously or, more often, unconsciously, they affect perceptions of credibility and are interpreted as expressing emotion.

Research on communication shows that we rely on nonverbal behaviors even though we often misinterpret them and even though there are no absolute formulas for their interpretation. For instance, crossed arms do not always mean "closed to communication," although some people might respond to crossed arms as if they do. Interpretation of nonverbal behavior becomes more accurate when "clusters" of behavior, or several behaviors, indicate the same conclusion.

There are, of course, *major* cultural differences over the meaning and interpretation of nonverbal behaviors. For example, the accepted length of a pause before answering a question varies greatly—some cultures consider it disrespectful to answer too quickly (it's more respectful to really consider the question before answering it). These differences take effort to understand, and while they are not the specific subject of this benchguide, they indicate the need to be cautious in cross-cultural situations when interpreting the nonverbal behavior of persons from various cultures.

B. Paths of Nonverbal Communication

Judges should be aware that they are sending—and receiving—messages through all of these nonverbal paths:

1. Voice (volume, articulation, pace and rhythm, pitch and inflections, pauses);
2. Eye contact;
3. Facial expressions;
4. Gestures;
5. Posture, movement, and body orientation;
6. Use of space and room arrangement;
7. Appearance and objects (clothing, jewelry, items on the bench, etc.);
8. Time (on time or not, time allotted, time allowed to speak, etc.);
9. Silence (differences in meanings assigned to silence, length of silence); and
10. Others—anything that people can interpret as being meaningful is communication (blushing, sweating, blinking, touching, crying, etc.).

C. Effective Nonverbal Communication

The following are tools for effective nonverbal communication on the bench:

1. Awareness of the communicative power of voice-vocal tone and inflections are key components in conveying respect for others. In addition, the rate of speaking will have an impact on the message's clarity, something that is particularly important when there are cultural differences.

2. Looking at a person while they are speaking shows attentiveness and makes it easier to see the speaker's body language and to regulate the interaction better. Judges should not be offended when litigants are shy about looking at them—power and cultural differences are often reflected this way.

3. Orientation of the body toward the speaker and sitting up straight or leaning forward slightly demonstrates engagement in the interaction, reinforces that the speaker should be directing his or her remarks to the judge, and encourages more active listening.

4. If verbal and nonverbal behaviors are inconsistent, people tend to believe the nonverbals. Maintaining congruence between the verbal and nonverbal messages, that is, sending a consistent message, will reduce uncertainty and add strength to the message.

V. Effective Listening Techniques

Effective listening means understanding the speaker's entire message, bringing together verbal and nonverbal communication skills. As the proverb says, "Speaking is when you sow, listening is when you reap." The skills discussed below should be considered from the perspective of the judge as listener *and* of others in the courtroom as they listen to the judge.

A. Active Listening: Capturing and Confirming the Message

Active listening usually involves four steps. First, focus on the speaker and his or her message. This should involve both *being* attentive and receptive and *demonstrating* that the listener is attentive and receptive—using nonverbal behaviors such as eye contact, nods, a positive tone of voice, and upright posture or a slight forward lean as well as verbal encouragers such as "I see," "Mm hmm," "Go on."

If the listener has to look down to take notes, he or she should explain that "what you are telling me is important and I am writing it down. I

may not be looking at you when I am writing, but I am listening. Please continue."

Second, draw out the message as necessary. It might be necessary to initiate the interaction, to encourage fuller responses or bring the speaker back from a tangent. Of course, one of the best ways to do this is to ask questions. The type of question will affect the answer.

1. Close-ended questions allow for short, direct answers; they often start with *is, are, did, do, when.* These are effective when specific information is needed and when it is necessary to establish control of the topic or the proceeding.

2. Open-ended questions allow for a broader range of responses; they often start with *what, how, why, describe, explain, tell, give an example.* These are effective when probing for information and when answers of greater depth are needed. Examples include "How so?" "Give me a little more information about," "Help me understand," "Tell me more about," "Give me some specific details about," and "Give me a word picture—like a slow-motion instant replay of."

Third, communicate understanding of the message. There are usually several levels of meaning in every exchange.

1. Content: facts, information. Paraphrasing is one of the most useful tools there is for checking (and showing) understanding of a message's content.

    a. "If I understand you correctly . . ."

    b. "What I'm hearing is . . . Is that right?"

    c. "So, you're saying . . . ?"

2. Emotions: feelings, reactions. When emotions play an important role in the message, it can be effective to acknowledge their existence. Even if the emotions aren't relevant to your decision, reflecting the emotions back lets the litigants know they've been heard and often allows them to move past the emotions to give you the information needed.

a. "It sounds like you're very frustrated. What I need from you now to help me make my decision is . . ."

b. "I'm sorry that you and your family are going through this at this time; could you tell me more about . . ."

3. Intent: why they're giving you this message, what they're trying to achieve with it, what the connection to the overall proceeding is.
   a. "You believe this information proves that . . ."
   b. "You want to make sure that I understand that . . ."

Fourth, encourage confirmation or clarification of the meaning. To make sure that the listener got the message, the judge should give the litigant a chance to verify or clarify the judge's interpretation ("Yes, that's what I meant" or "Well, not quite, your honor. What I meant was . . .").

Voicing the speaker's own feelings can be useful in conveying empathy: "I can tell that you really tried to…"; "I can tell that you really care about …"[61]

B. Additional Tips for Better Listening

1. Listeners should begin with the desire to listen. Attitude affects effectiveness.

2. Listeners should focus on the message. Tune out distractions, including those created by the speakers themselves (e.g., nervous quirks) and their own internal distractions.

3. Listeners should try to understand the speaker's viewpoint. Life experiences affect perspective. Some effort can overcome the potential for misunderstanding that sometimes comes with differing life experiences.

[61] *Ibid*.

4. Listeners should withhold judgment as long as possible. Once we label something as right or wrong, good or bad, we lose objectivity.

5. Listeners should reinforce the message. Everyone can think four times faster than most people speak. One can become a better listener by making good use of this ratio—mentally repeat, paraphrase, and summarize what the speaker is saying.

6. Listeners should provide feedback. They can use both the verbal and nonverbal channels when possible. (See below for tips on giving verbal feedback.)

7. Listeners should listen with their whole body and look at the speaker. Being physically ready to listen usually includes sitting erect, leaning slightly forward, and placing both feet flat on the floor. Not only will the speaker feel that the listener is actually listening to them, but the listener is more likely to listen better (behavior both reflects and affects attitudes).

8. Listeners should listen critically. Even though listeners should try to understand a speaker's viewpoint and withhold early judgment, they obviously need to test the merits of what is heard. This is the real balance—being open-minded *and* being able to critically evaluate what is heard and the credibility of the sources.

C. Constructive Feedback for the Listener

When it is particularly important that the listener receive feedback, the following tips may make it less likely that the listener will become defensive and tune the message out. Speakers should do the following:

1. Begin with a positive statement;
2. Be specific—make clear both what is meant and what is to be done about it;
3. Be honest but tactful (a real skill!);
4. Personalize your comments by using the listener's name occasionally and using "I" language to describe your

perceptions and reactions, to reduce defensiveness and help establish rapport;
5. Reinforce the positive and mention what they've done well;
6. Tell them what's in it for them (positive consequences of getting this feedback);
7. Emphasize a problem-solving approach to the negative; and
8. End with a positive statement. Sandwiching the negatives between positives makes them more palatable.

D. Tips for Helping Others Listen Better

Judges should also consider these choices in addition to using the techniques discussed earlier.

1. Visual Supporting Materials. Getting the information through more than one channel enhances comprehension and retention. There are many different types of learners—visual and auditory are two—and using more than one channel will build on the strengths of more listeners and reinforce the information for everyone.[62]

2. Conducive Listening Environment. Even though speakers may not have control over such factors as the acoustics, the seating and temperature, the frequency of breaks, the ambient noise, the number of interruptions, and so forth, they can significantly affect how well the listeners can concentrate. Controlling the factors that one can, and balancing the others by using as many techniques as possible for better communication, will help.

3. Decreasing "Distance." The courtroom environment and procedure, including the level at which the judge sits and the robe and demeanor, establish the judge's clear position of authority. But "judicial demeanor" does not mean that a judge has to be intimidating. Judges should speak directly and personally to the litigants. The judge will appear to be more in control and will get better responses when they seem comfortable with the litigants as people and appear to want to understand their needs and problems.

---

[62] *Ibid*.

4. Building Self-Awareness and Skills. A speaker's mannerisms can distract even good listeners—try to identify any distracting habits (videotaping can help to identify these) and to work on removing them.

VI. Potential External Barriers to Communication

The following can be significant barriers to communication.

A. Physiological and Environmental Factors

1. Thinking ahead of the speaker;
2. Preoccupation/boredom;
3. Message overload/listener fatigue;
4. Physical distractions (noise, disruption);
5. Stress, physical discomfort, fear;
6. Mental illness; and
7. Time pressures.

B. Individual Differences and Assumptions

1. Personal mannerisms;
2. Fear of appearing ignorant; and
3. Assuming that listening is passive and effective communication is the responsibility of the speaker.

C. Bias, Both Conscious and Unconscious

1. Power or status;
2. Language comprehension and proficiency;
3. Accent;
4. Culture or ethnicity;
5. Economic level or factors;
6. Gender and sexual orientation;
7. Education level;
8. Age;
9. Physical or mental ability or disability;
10. Appearance; and
11. Other differences.

VII. Tools for Dealing With Cross-Cultural Communication Issues

Cultural norms and values shape all communication experiences. Because the mainstream American culture and justice system place a high value on explicit, direct communication (what is said—the content and exact meaning of words), there is ample opportunity, if not a likelihood, for miscommunication in cross-cultural exchanges where the context of words, *how* words are said or written, and the circumstances surrounding the communication event are emphasized. Strategies to minimize potential barriers created by cross-cultural communication include all the techniques, especially listening, mentioned but might also include the following.

Speakers should

1. Speak audibly and distinctly, but without exaggeration;
2. Speak in a relaxed and unhurried manner, and slowly, if necessary;
3. Not speak louder in an effort to be understood (a common reaction, but often interpreted as intimidating, even hostile);
4. Be willing to take the time to explain or rephrase what is said, if necessary;
5. Communicate concepts clearly and in an orderly manner;
6. Give examples to demonstrate;
7. Learn the correct pronunciation of a person's name;
8. Not expect tone of voice that is meant to convey emotion (e.g., sarcasm, humor, praise, blame) to be understood (messages not intended literally may be interpreted as such);
9. Avoid colloquialisms, slang, and mixed language;
10. Not rely on eye contact (or lack thereof) to indicate respect, honesty, credibility, guilt, and innocence;
11. Not ask questions in the negative;
12. Remember that "Yes" or "OK" may mean "I am listening" or "I have heard what you said" rather than agreement, or that nodding may be a sign of respect, not of agreement; and
13. Understand that nondirect answers, or brief limited answers, are not necessarily signs of lying or withholding.

Listeners should

1. Ask the speaker to slow down, enunciate more clearly, repeat, rephrase, or simplify;
2. Rephrase or summarize for clarification and confirmation; Make it clear that you really want to understand what the speaker is saying;
3. Not interrupt, unless necessary;
4. Respect silence;
5. Allow extra time;
6. Not make assumptions about facial expressions, body movement, or hand gestures (or lack thereof);
7. Not make assumptions about tone of voice or nonlanguage sounds;
8. Not misinterpret an effort to make oneself understood by speaking more loudly as anger or aggression;
9. Not interpret silence as agreement;
10. Expose themselves to different accents to get used to them; and
11. Educate themselves as much as possible on cultural issues of the communities the court serves.

In asking questions of persons from different cultures, it is helpful to remember that the frame of reference can make a large difference in communications. For example:

> Context is so important! I once interpreted in a case where a Guatemalan was asked to describe one of the parties. He said that she was a tall blonde. Well, that was true from his perspective, but to the judge and most members of the jury, she looked more like a medium-height brunette. And it seemed like he was lying. Instead of asking for a description, I recommend that judges ask if there is a person in the courtroom who looks like the person being discussed.
>
> - Court Interpreter

1. Persons who have grown up in most countries other than the United States or England use the metric system. It may be easier to ask the person to compare the length of the object in question to something in the courtroom.

2. In many countries, December 14 would be written as 14/12 rather than as 12/14. In asking about dates, it is helpful to ask for the name of the month and date.

3. In Mexico, the father's surname appears first and the mother's second. For example, Jose Garcia Chavez would generally go by the name of Jose Garcia. Judges may want to ask what the father's last name is in order to determine the person's "official" last name.

4. Students in Spanish-speaking countries are generally not taught to spell in their head. Thus it can be difficult to spell their name out for the judge or court reporter. It is generally better to give them the opportunity to write out their name in order to avoid discomfort and misspellings.

5. In traffic cases, questions like "Were you going southbound or northbound?" may be difficult to answer for persons from cultures more apt to think of landmarks—toward the ocean, toward the mountains, toward the city.

6. Many persons from other cultures find it rude to point at others. Thus they can be asked where the person is sitting, what clothing they're wearing, or similar identifying questions.

Conclusion

Judges who use the techniques in this chapter report that they obtain more information from litigants on which to base a decision and that they feel more in control of their courtroom. Research indicates that good communication results in a higher level of compliance with court orders.[63] Thus these techniques have the potential not only to make the judicial experience more satisfying but also to improve the quality of justice.

[63] D. Eckberg and M. Podkopacz, *Family Court Fairness Study* (Fourth Judicial District of the State of Minnesota, Fourth Judicial District Research Division, 2004).

CHAPTER 10: AVOIDING UNINTENDED BIAS

10

Avoiding Unintended Bias

Introduction

One of the special challenges of dealing with self-represented litigants is that judges have to interact with people from a wide variety of cultures and backgrounds without a lawyer acting as the “translator.”

This chapter describes the often serious unintended problems that this can cause for access to justice for the self-represented, takes the experiences and insights of many judges, and suggests ways that judges can work to overcome these dynamics in their judging.

I. The Roots and Dynamics of Unintended Bias

Lawyers have generally been to law school for at least three years. They’ve spent time with other law students and lawyers. They’ve read cases, watched hearings, and often have years of experience in the courtroom. They know the legal shorthand used in most types of cases. Often they’ve appeared in front of a particular judge on multiple occasions. They generally understand what information that particular judge wants, which issues are relevant and which are not, and they are not as emotionally involved in the case as their client is. A judge can therefore interact with all attorneys in pretty much the same way; a judge does not have to adapt his or her style to accommodate the minor differences among the attorneys.

In contrast, most people representing themselves have had very little contact with the court system. They know a lot about the facts in their case, but they often don’t know how to fit that knowledge into a legal solution. They don’t know what to expect in court.

Sometimes they've come from other countries where it may be disrespectful to look a person in authority in the eye—or where going to court means paying money in bribes or being fearful of going to jail. Sometimes they've gone to court in different states or for different types of cases and have expectations based on those experiences. Most have family or friends who've had some type of experience in court, and those people have given suggestions that vary dramatically in their helpfulness. Most people have seen *Judge Judy* or *L.A. Law* or *Perry Mason* or *Judging Amy* or *The People's Court* or *Kramer vs. Kramer* or *My Cousin Vinny*. They know that it isn't all true, but it still forms some part of their understanding of the legal system and shapes their expectations.

The Canons of Ethics require judges to act without bias. But when dealing with litigants directly—people of all colors, economic backgrounds, cultural backgrounds, and mental capacities—it is well-nigh impossible that judges won't have some biases to confront and consider. Most judges aren't even aware of these biases, but it's important to consider these issues while being a judge in one of the most diverse areas in the world.

> As a lawyer and now a judge, I've always worked in a culture where most of my colleagues are quite smart and articulate. We all went to school for many years, read a lot, and write well. I was really shocked to learn that half of the American people read at less than fifth-grade reading level—and that doesn't even count litigants who come from other countries, many of whom had few opportunities for organized education. I find that when I read a pleading from someone who clearly has problems with writing or spelling, I remind myself not to confuse literacy with stupidity. I figure they can probably fix a car or my computer much easier than I can. Sometimes it's really frustrating, but overall, I'm really proud that our court system is open enough that everyone can have their day in court (even if they can't spell).
>
> —Judicial officer

II. Social Science and the Dynamics of Unintended Bias

The field of social cognition (the study of the relationship between mental processes and social behavior) offers one way to think about these issues. Research in this field helps us understand the natural

processes of categorization of and preference for people based on group identity. In one study, judges (like other groups) demonstrated the following common cognitive illusions:[64]

1. Anchoring (making estimates based on irrelevant starting points);[65]

2. Framing (treating economically equivalent gains and losses differently);[66]

3. Hindsight bias (perceiving past events to have been more predictable than they actually were);

4. Representativeness (ignoring important background statistical information in favor of individuating information); and

5. Egocentric biases (overestimating one's own abilities).

The following conclusions drawn from cognitive science research provide judges with valuable insight into the human vulnerability to unintended bias.

A. Categorization of and Preference for People Based on Group Identity

In fact, the human ability to categorize experience is an indispensable cognitive device for understanding, negotiating, and constructing the world.[67]

---

[64] C. Guthrie, J. Rachlinski, and A. Wistrich, *Inside the Judicial Mind* (2001) 86 Cornell L. Rev. 777.

[65] For instance, if a class of students is asked whether the Mississippi River is longer or shorter than 2,000 miles and then asked the river's length, and a second class is asked whether the Mississippi River is longer or shorter than 500 miles and then asked the river's length, the first class will invariably provide answers that are higher than those given by the second class.

[66] For instance, most people will prefer a certain $100 gain to a 50 percent chance of winning $200. On the other hand, most will prefer a 50 percent chance of losing $200 to a certain loss of $100. In other words, people tend to make risk-averse decisions when choosing between options that appear to represent gains and risk-seeking decisions when choosing between options that appear to represent losses.

[67] R. Brown, "Prejudice: Its Social Psychology" (1995), p. 39.

The human mind tends to organize everything, including people, into categories. Social scientists believe that this mental process may have prehistoric roots, ensuring the survival of our genetic code. Today it translates into *social categorization*, or grouping people based on any number of characteristics, including race, ethnicity, skin color, gender, age, sexual orientation, physical and mental abilities, religion, economic status, language ability, education level, and so forth.

Within a fraction of a second of encountering another person, human brains register automatically and without conscious awareness that person's race, sex, and age. Our brains take "short cuts" to deal with, organize, and simplify a complex world. These are sometimes referred to as *heuristics*.

B. Human Brains Encode Information About Groups of People Into Memories

These mental constructs are sometimes called "schemas." In this way, brains can be likened to computer hardware—what goes in that hardware will differ from person to person, but humans all process, code, store, and retrieve data similarly.

Similar to categorization, stereotyping is a mental shortcut that forms associations between groups of people and the attributes we believe typical of those groups. Stereotypes can also be either positive or negative. One might, for example, have a stereotype of all lawyers from one law school as smart and another law school as dumb.

C. Humans Strongly Prefer Persons From the Same Social Categories

This phenomenon is sometimes called in-group favoritism and out-group derogation. Whether these preferences are strong or weak, or whether they exist at all (there are instances where people prefer those in groups to which they do not belong, for example) will vary from person to person.

D. Humans Tend to Perceive "Out-Group" Members as All the Same

An example of this is the "they all look the same" phenomenon. We also engage in *in-group overexclusion* whereby ambiguities as to whether someone belongs or does not belong to our group are most likely to be resolved against inclusion.

E. Preference for Members of In-Groups Begins at an Early Age

These preferences become automatic, habitual lenses through which we view the world. Children can show in-group preference before the age of two.

Children exposed to racial diversity at an early age often exhibit a clear absence of in-group favoritism and out-group derogation.

However, contact alone is generally not enough, and other factors must be present:

1. There should be institutional support for the measures designed to promote the contact;
2. The contact should be of sufficient frequency, duration, and closeness to permit meaningful relationships to develop between members of the groups concerned;
3. As much as possible, the participants in the contact situation should be of equal status; and
4. The contact should involve cooperative activity.[68]

F. Human Brains More Readily Process Information That Confirms Our Beliefs, Attitudes, or Stereotypes

In fact, when humans are faced with information inconsistent with our beliefs, we revise them under certain circumstances, but we are more likely to create a subgroup category (an exception), leaving the initial

[68] *Ibid*., pp. 268–69.

general belief intact. This is especially true when the out-group is large and the association or stereotype negative.

Some examples of this are "You're different from (or 'not like') other _____", or "You can come home for Thanksgiving, but don't bring your _____ friends." Thus stereotypes are much like *heat-seeking missiles in search of confirming information.*

We also have a propensity to ascribe the mistakes or failures of others to their inherent qualities or flaws but our own mistakes or failures and those of people in our in-groups to external circumstances.

G. These Early Beliefs, Attitudes, or Stereotypes Continue to Exist at an Unconscious Level

These biases may persist despite a commitment to moral and ethical principles such as equal justice, honesty, and integrity in decision making, or to making decisions based only on the facts and circumstances of each case.

H. Implicit Bias Affects Even Nonverbal Behavior

Research indicates that the extent of teachers' differing expectations about girls' and boys' abilities to learn various subjects is directly correlated to girls' and boys' subsequent actual learning in those subjects.[69]

This phenomenon has been repeatedly demonstrated in studies of the interview process. Without knowing the purpose of these experiments, interviewers consistently sit farther from, are less friendly to, make more speech errors, and take less time with interviewees who are members of disfavored groups. Conversely, interviewees who are interviewed by experimenters who are instructed to exhibit these behaviors deliberately mirror the behaviors.

---

[69] M. Palardy, "The Effects of Teachers' Expectations on Children's Literacy Development" (1998) 35(4) *Reading Improvement* 184–86; P. Murphy, and E. Whitelegg, "Girls and Physics: Continuing Barriers to 'Belonging'" (2006) 17(3) *Curriculum Journal* 281–305.

I. Implicit Bias Increases Under Certain Circumstances

These circumstances include stress, time pressure, distraction, boredom, absence of accountability, and lack of motivation to be fair and accurate.

This poses real challenges for judges, who are often under stress, lack time, and are distracted and bored.

Of course, judges are extremely motivated to be fair and accurate. However, the possibility of implicit bias may arise more in cases with self-represented litigants with no intermediary lawyer to facilitate or carry out the communication, or when some judges may feel less accountability where there is less likelihood of an appeal.

In one interesting experiment on accountability, subjects who were convinced that a (bogus) skin electrode apparatus could detect their "true" feelings were far more willing to report socially sensitive attitudes and stereotypes than those not connected to electrodes.[70]

J. Emotional State Can Also Influence the Tendency to Implicit Bias

Psychologists investigating the link between emotions and prejudice have found that anger increases the likelihood of a negative reaction to members of a different group and that sadness or a neutral emotion does not.

They have also found that the responses of happy people are quite similar to those of angry people—both are more likely to draw on negative stereotypes when judging guilt or innocence. Sad people "may have been in a frame of mind that led them to evaluate the case histories more slowly and to reach more judicious conclusions." Sad people were, if anything, biased in favor of those linked with negative stereotypes.

[70] Brown, p. 211.

III. Implications for the Judicial Fact-Finding and Decision-Making Process in Cases Involving Self-Represented Litigants

Therefore cases involving self-represented litigants raise the usual unintended biases that judges have to consider in all cases—biases such as race, gender, language, and economic status. The stereotypes to which we are all vulnerable may be triggered more easily during stressful, high-volume, repetitive, time-pressured, tiring calendars—all too often hallmarks of calendars involving self-represented litigants. Moreover, this likelihood might become even greater in the absence of attorneys who normally act as intermediaries between the judge and the litigant and who also bring to the courtroom certain distancing formalities of language, discourse style, and interaction.

In addition to these usual biases, the issue of self-representation can itself bring up various attitudes and assumptions on the part of judges. Some of these include the following beliefs:

1. High-volume/high self-represented litigant calendars are "punishment" assignments;
2. Self-represented litigant calendars are not real "judge work";
3. Self-represented litigants are unable to effectively represent themselves and are usually unprepared, and their pleadings and papers are unintelligible, do not raise relevant issues, or both;
4. Self-represented litigants are less educated if not illiterate;
5. Self-represented litigants lie;
6. Cases and calendars where one or both parties are self-represented are longer, slower, more stressful, more frustrating, often volatile, and sometimes unsafe;
7. Hearings in which one side is represented and the other is not are prone to numerous evidentiary challenges and accusations of judicial impropriety when efforts are made to "level the playing field"; and
8. If they really wanted to, self-represented litigants could get a lawyer.

The "kernel of truth" notion asserts that stereotypes and assumptions about people must be based on *something*, so there must be a kernel of truth in each of them. Although some stereotypes (not all) reflect a real difference in averages between groups, it is obvious that

stereotypes are unreliable as a basis for making judgments about individuals.

We also need to remember that litigants come to court with various expectations and biases and that those assumptions and biases may also affect how they act in the courtroom.

> I use a script at the beginning of my domestic violence calendar. It takes about 10 minutes, and I use it to explain how the day is going to go and set the tone. I don't even have to think about it any more. I watch to see who's sitting with who, who has a little kid that we'll want to get out early, who is really upset, who's laughing at my jokes. It also gives them some time to get used to the idea that I'm a Chinese American woman hearing their case.
>
> —Judge

IV. Specific Techniques to Minimize Implicit Bias

How do we counter these implicit biases to treat everyone as an individual who deserves his or her day in court? Research has shown that the following techniques minimize the potential impact of implicit bias. Strategies that judges report using are in boxes.

A. Stay Motivated to Be Fair and Accurate

Within our system of justice, there are many safeguards against the operation of personal bias in judicial decision making, foremost among them the ethical imperatives that guide and constrain judges. It is unlikely that any judge is not motivated to be fair and accurate. However, research indicates that good intentions are not enough to offset implicit bias. Conscious attention and effort are also needed.

> "Remember the canons relative to bias, prejudice, fairness, etc. Remember the Constitution requires a 'neutral, *detached* magistrate.'"

B. Maximize Accountability

Again, the justice system incorporates various safeguards against the operation of personal bias, including, in most cases, the availability of a record and the opportunity to appeal. Judges have also suggested reviewing their own rulings or decisions for patterns or asking a colleague to periodically observe their courtroom communication or review a difficult ruling.

> "Have someone else review my decision if I feel it may contain bias."

C. Take Ample Time

Are hearings with some groups longer? Shorter? Why? Studies in the context of interviewing indicate that interviewers with negative bias toward a certain group take less time, make less eye contact, sit farther from, and make more speech errors (e.g., stuttering, hesitations) when interviewing a member of that group.

> "Allow both parties the same amount of time to address the court."
>
> "Prepare in advance about the people and the issues; allot sufficient time for hearings to avoid impatience; listen in the courtroom to make each person become an individual to me."
>
> "Slow down; listen carefully."

D. Minimize Distraction and Pay Attention

Strong emotion, stress, or distraction increase the likelihood of relying on automatic responses. One's physical and mental health will influence one's ability to stay focused.

"Focus hard on the argument being presented to counteract boredom/stress/time pressure."

"Avoid becoming overworked; when overworked, I revert to rote/easy methods of accomplishing things. Bias can creep in when taking the easy way out."

E. Be Conscious of Difference

This may seem somewhat counterintuitive and even dangerous, because we are taught that "justice is blind," that we live in a "color blind society," and that we must "treat everyone the same." In reality, we are acutely aware of differences whether or not we consciously acknowledge them, and we are more likely to make judgments based on implicit biases related to those differences if we attempt to ignore them. Recent research indicates that once the defendant's race in a jury simulation is explicitly referred to and jurors are made aware of the potential for their race bias, they are better able to correct for it.[71]

"I affirmatively recognize that I might have a bias about a person and then consciously put it aside."

F. Think About Thinking

To engage in an intentional thought process, judges might make a conscious effort to wait until all facts are present before judging, as jurors are admonished to do.

"Question basis for determinations—assumptions or facts?; question inferences—accurate or caused by bias?"

[71] S. Sommers and P. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom* (2001) 7(1) Psychology, Public Policy and Law 201–229.

> "I try flipping—pretending that the litigants have switched roles. For example, if a litigant is not well-dressed, I pretend that the other litigant is dressed that way and ask myself if I would rule differently."

G. Confront Cultural Stereotypes

Cognitive scientists have developed an online experimental tool, the Implicit Association Test (IAT), that assesses unconscious attitudes, or implicit bias. Data gathered from over 2.5 million online tests reveals, for example, that at least 75 percent of test takers show an implicit bias favoring the young, the rich, and whites.[72]

Readers are encouraged to take the IAT by going to www.implicit.harvard.edu. Most test takers report at least some disparity between their conscious intention and the test results. At the very least the test may direct one's attention to areas in need of self-scrutiny.

> "Cross-check analysis (e.g., sentence) with substitute category (male for female, or race)."

H. Seek out Images and Social Environments That Challenge Stereotypes

In "How (Un)ethical Are You?" by Mahzarin R. Banaji and colleagues, the authors describe a judge who, despite a strong belief that her decisions were unbiased, was concerned that she might be harboring unconscious prejudices from working in an environment that daily reinforced the association between black men and crime. She decided to create an alternative environment by spending some time in a neighboring court where the criminals being tried were predominantly white. Malcolm Gladwell, in the bestseller *Blink*, recommends

[72] M. R. Banaji, M. Bazerman, and D. Chugh, "How (Un)Ethical Are You?" (December 2003) *Harvard Business Review* 56–64.

periodically calling to mind positive representatives of groups that are routinely stigmatized by negative cultural stereotypes.

> "Get into the community more often with diverse groups."
>
> "Educate myself about other cultural norms. Take time to talk to interpreters, even if the litigant does not appear, about the culture and language nuances as they relate to the issues we handle."

I. Maintain Constant Vigilance

What the *Harvard Business Review* says of managers holds true for judges: "Managers who aspire to be ethical must challenge the assumption that they're always unbiased and acknowledge that vigilance, even more than good intention, is a defining characteristic of an ethical manager."[73]

> "Keep reminders (nonobvious) notes on the bench not to buy into patterns."

> I know that I'm not going to understand all of the cultures in the world, but I do try to learn about the cultures of people in my community. I go to community events, read books about their cultures and affirmatively work to find out more about their lives. One of my favorite books is *The Spirit Catches You and You Fall Down*, which Ann Fadiman wrote about the Hmong culture in the Central Valley."
>
> —Family law judge

[73] *Ibid.*, p. 64.

Conclusion

The roots and dynamics of unintended bias run deep throughout all of life, and the judging enterprise is no exception. A commitment to understanding and eradicating these dynamics can go far in building access to truly neutral justice for all.

CHAPTER 11: ADDRESSING LITIGANT MENTAL HEALTH ISSUES IN THE COURTROOM

11

Addressing Litigant Mental Health Issues in the Courtroom

Introduction

For many judges and court staff, the problems of dealing with self-represented litigants are exacerbated by the fact that some of them may be suffering from forms of mental illness, recognized or unrecognized. This is particularly apparent in criminal cases where litigants generally have the right to counsel and are choosing to represent themselves.

Judges and court staff are often deeply uncertain about how to deal with these litigants, fearful of a potential loss of control and sometimes even of actual physical risk. At a minimum, these litigants are seen as highly disruptive to court functioning.

This chapter discusses the dynamics of mental illness in the self-represented litigant context and suggests approaches to assist in addressing litigants' needs and to minimize disruption of court processes.

I. Current Scientific Perspective on Mental Health Problems

A. The Roots of Mental Illness

Historically, mental health problems were thought to be behavioral in origin and nature. Modern medical research has taught us that mental health problems are the result of biological brain disorders that are diagnosable and treatable. Effective treatment, however, is often difficult for many to access. Generally, the behaviors exhibited by those with mental problems are symptomatic of their brain dysfunction.

B. The Burdens of Mental Illness

Litigants with mental health problems can be expected to carry significant psychological burdens as well. Some examples of such burdens are the following:

1. Adjusting to the Disease. Living with the disease is frightening. Mentally ill individuals are frequently misunderstood and isolated. They often feel like a disappointment or a burden to loved ones, and can also worry about harming them.

2. Social Stigma. Mental illness carries a social stigma that depletes a person's sense of self-worth. Mentally ill individuals often have been subjected to shaming, blaming, and guilt-inflicting behavior by others.

3. Fear. Litigants with mental health problems can be expected to be significantly fearful in the courtroom. How they exhibit this stress will vary from individual to individual.

C. Common Responses to Mentally Ill Litigants

Judges working with mentally ill litigants are often highly motivated to be helpful to them. Cognitive neuroscience has found that the desire to help people in trouble is strong.[74] This normal interpersonal response

[74] E. Kohler, C. Keysers, M. A. Umilta, L. Fogassi, V. Gallese, and G. Rizzolatti, "Hearing Sounds, Understanding Actions: Action Representation in Mirror Neurons" (2002) 297(5582) *Science* 846–848; L. E. O'Connor, "Pathogenic Beliefs and Guilt in Human Evolution: Implications for Psychotherapy." In *Genes on the Couch:*

mechanism for human beings, as well as other highly social mammals, accounts for such things as our drive to hold our families together, to empathize with others whether or not we have consciously chosen to do so, or to commit acts of heroism entailing enormous self-sacrifice without much prior conscious analysis.

It also helps account for the varying levels of pain and discomfort, sometimes referred to as "survivor guilt," that we feel when exposed to those less fortunate than ourselves. Examples vary all the way from the horror of witnessing an injury accident, to listening to the testimony of a person who has been brutalized, to avoiding a homeless person trying to sell papers on the street, to how we feel generally around sick people or while visiting in hospitals.[75]

Judges must be able to recognize feelings of discomfort they may have in dealing with a litigant's mental health issues. Many people feel uncomfortable working with such individuals. (This can be just as true for mental health professionals as for lawyers and judges.) The "survivor guilt" response can account for much of this discomfort.

This feeling can arise fairly easily—prompted by the litigants' appearance, speech, or demeanor, or some bizarre act on their part. A judge may be only vaguely sensitive to the feeling, particularly while working on a busy calendar, and will simply feel more pressured or will experience impatience or some other uncomfortable state. Unfortunately, the emotional defenses against these uncomfortable feelings are such things as anger, frustration, or blaming the litigant. These undesirable responses are particularly likely to appear when a judge is unaware of, or does not understand the reason for, his or her own discomfort and acts out on those feelings perhaps because of being distracted by a busy docket.

Judges are required to work with litigants with mental health problems in situations that can cause significant frustration. It is important that such feelings not get in the way of decision making.

Unfortunately, it is not always possible for the court to intervene in some way that will be helpful to a litigant. Litigants with mental health

---

Explorations in Evolutionary Psychology (P. Gilbert and K. Bailey, eds., London: Brunner-Routledge, 2001), 276–303.

[75] L. E. O'Connor, J. W. Berry, and J. Weiss, "Interpersonal Guilt, Shame and Psychological Problems (1999) 18 *Journal of Social and Clinical Psychology* 181–203.

I was handling a case with a really resistant defendant who just wasn't complying with any of my orders. During hearings he would often fail to pay attention when I spoke to him, would not respond directly to questions, and seemed unwilling to cooperate with reasonable requests. I tried sanctioning him, but that didn't seem to make a difference.

In reviewing his file, I saw that his mother had only been 20 years old when he was born and had been repeatedly incarcerated for alcohol-related offenses. It occurred to me that he might be suffering from fetal alcohol syndrome and that maybe his failure to comply with orders was as a result of an inability to do so.

I changed my approach from treating him as willfully noncompliant to someone who was going to need coaching to make it through the legal requirements. I had him come to court more often and started praising him for anything positive that I could find that he had done. Lo and behold, he actually started following my orders. I'm not a doctor and don't know if that's really what his situation was, but realizing that there might be a physical cause for some of his actions helped me not take what he was doing so personally and helped me be more creative in how I responded to it.

—Judge

issues are more likely than most to ask the court for relief that is simply not available.

Being unable to help a litigant, or even to help him or her understand why the proceedings are going the way they are, is highly unpleasant for almost any judge. If this occurs frequently, judges can become vulnerable to withdrawing empathy from the litigant(s) altogether in an attempt to avoid the emotional stress of the situation.

Even when a judge is able to be helpful, litigants are not always able to acknowledge the help they are receiving. They behave in an argumentative or otherwise difficult manner toward the judge, which may add to the judge's frustration and ultimately create resentment.

There are numerous reasons why individuals with mental illness may not seek or accept treatment that has been offered to them. When litigants appear as if they do not want help, it will stem from one or both of two sources: either a negative prior experience with mental health treatment or their own symptomology.

Although improvements have been made, many antipsychotic medications have serious and permanent negative side effects. Many persons with serious chronic mental illness are simply not capable of keeping up a medication regimen and routinely making appointments on time, and so reasonable outpatient treatment is not feasible. Furthermore, they cannot cope with the social interactions necessary to manage handling a serious chronic illness on their own and often simply give up on the mental health system.

Some individuals with mental health issues, and often those addicted to drugs and alcohol, will not seek treatment because they have lost all hope of being able to recover. Often this is expressed as denial of the problem. This denial disappears quickly as the possibility of recovery becomes more of a reality.

The overlap with the lack of medical detoxification facilities is clear. When medical detoxification is available, the resistance to treatment declines considerably.

If a judge can communicate to litigants his or her genuine belief that recovery is possible, the effect can be dramatic in breaking through addict hopelessness and denial. Drug treatment courts have found coercive treatment to be effective for many addicts, particularly when conducted in treatment courts presided over by genuinely supportive judges who can communicate their confidence in the individual's ability to get and stay clean and sober.

Not as personally related to the litigants is the fact that the legal system has become a frontline of mental health treatment. People who are in trouble, who need help far beyond what the court has traditionally provided, are now appearing as self-represented litigants. Court staff, self-help centers, prisons, and county and state jails are charged with taking care of the chronically mentally ill, the suicidal and high-acuity mental crises, the drug addicted, and those without resources. There are simply not enough places to refer people for the help they need.

Unless they are abusing alcohol and other drugs, most people with mental illness are no more violent than people without mental illness.

Nevertheless, if feelings of discomfort rise to the level of fear, it is imperative to pay attention to that feeling. Judges must put their own safety, and that of their staff, above other considerations. A litigant

with mental health issues may act in a threatening manner simply to see how a judge will respond, hoping that the judge will remain calm and in control. Or the litigant may be threatening as a warning that they are about to actually go out of control. There is no way to know for sure. Security must be the priority.

II. Strategies for Responding to These Challenges

A. The Importance of Case Specificity

The following suggestions are generalizations and are given in hopes of being helpful; however, judges should understand that there are no formulas for dealing with litigants' mental health problems. What works well with one litigant may be completely ineffective or even harmful to another with the same disorder. While medical professionals have clustered mental health symptoms into patterns of diagnoses, there is no patient profile that predicts anyone's interpersonal reactions in any particular situation. The most important thing is to pay careful attention to each individual. Each case is different and requires the judge's specific attention and assessment.

B. Responding to Seriously Impaired Litigants

Judges may be called on to make certain kinds of mental health judgments from the bench, even when not in civil commitment or other mental health court assignments. Progress of a case may have to be deferred until the mental health issue has been addressed.

1. Hospitalization. Most jurisdictions have similar criteria for determining whether a person should be taken involuntarily to an emergency inpatient facility.

    a. Is the person a danger to himself or herself?
    b. Is the person a danger to others?
    c. Is the person so impaired as to not be able to tend to the basic necessities of life?

2. Law Enforcement. If a judge perceives that any of these factors is applicable to litigants in the courtroom, he or she may want to request the immediate assistance of local law enforcement. In most states, law enforcement officers are

trained in the assessment required for admission to an emergency psychiatric facility, or they know where to promptly obtain such an assessment.

3. Adult Protective Services. If the litigant is not going to fit the hospitalization criteria, but is still so seriously impaired as to prevent meaningful participation in the case, a call to the local Adult Protective Services might be helpful in getting services for the litigant—including legal services.

4. Guardian Ad Litem. A seriously disordered litigant may have a friend or family member who would be willing to serve as a GAL. The court should consult with local legal services programs, public defender offices, and local bar association pro bono programs to determine how to get qualified legal representation for guardians ad litem and to have review of the appropriateness of the proposed guardian. The court should not proceed with a guardian ad litem unless it is clear that the nature of the disorder prevents the litigant from proceeding on his or her own.

5. Public Guardian. A call to the public guardian might also result in assistance for the person, possibly through the provision of a GAL or a conservatorship proceeding.

C. Dealing With the Chronically Mentally Ill

Often, persons suffering from chronic mental illnesses bring matters to the court. They are either asking for help from the court or are the subject of an action for relief by some other person. The following approaches may be helpful.

1. Relieving the Litigant's Anxiety. Judges might think of themselves as anxiety relievers for a chronically mentally ill person. A litigant may be suffering from a delusion or hearing voices, or may be in some other equally frightened state of mind.

2. Seeking Help for Delusions. Mentally ill litigants might ask the court to help them with their delusions. For example, they might ask the court to stop the government from implanting a microchip in their tooth; to restrain their neighbor from coming through the wall at night while they

sleep; or to offer relief from the poison the phone company has put into their air vents.

3. Paying Respectful Attention to the Litigant. The litigants will be paying close attention to whether the judge is trying to simply "get rid" of them. They have most likely had many experiences with people being frightened by them and trying to dismiss them as quickly as possible, and so are highly sensitive to this sort of treatment.

4. Using Staff to Talk to Litigants. If there are self-help support people available, they may be able to spend some time with the litigants, work with them, and help find useful resources for them.

5. Sticking Strictly to Facts—and Being Honest. The judge can say that the litigant's story sounds unusual; that he or she has never heard of the government implanting chips before, and so forth. This can be done without directly dismissing the person's own sense of reality. There is no need to verbally label the person as crazy or directly point out his or her mental illness. Point out what evidence would be needed to get the relief requested—is it possible to get an x-ray from a dentist showing the chip in the tooth? a photograph of the neighbor coming through the wall? or an analysis of the poison air from the vent? In asking for this proof, the judge is merely asking what he or she would ask of anyone. Once this is explained to litigants with mental illness, they generally accept this information as an indication that they are not being singled out.

6. Making a Legal Service Referral. If the litigant is making a request for relief from the court, a referral to a community legal services resource or the local pro bono program would be enormously beneficial. If the litigant is the subject of a request for relief by another, this referral becomes even more critical.

7. Making a Social Service Referral. If the person seems open to suggestion, it may be possible to make a referral to some local mental health resource. In making such a referral, the judge should make it clear that he or she wants to be helpful and is not being disapproving or punitive. For example, the judge might say, "I think you

might be able to get assistance at County Behavioral Health" rather than "I think you should go to . . . ," as if the judge had diagnosed the litigant. The individual, however, may simply be too fearful to be open to such a suggestion.

D. Excessively Frightened or Paranoid Litigants

Most litigants are anxious about being in a courtroom. Self-represented litigants who are excessively frightened or even paranoid can be particularly challenging for judges because it can often be difficult to question them. A litigant may resist answering the questions the judge asks.

1. Not Pushing. Pushing for answers by the judge may make the problem worse.

2. Stepping Back. In stepping back rather than increasing pressure on the litigant, the judge can redirect the conversation or take a brief break and try again. Aggressive questioning is likely to fail and can lead to an increasing sense of struggle between the judge and the litigant. This type of courtroom tension is counterproductive for everyone.

3. Using Staff. If there are self-help support staff available, perhaps they can take time to work with the litigant while the judge proceeds with other matters.

4. Being Realistic. Judges should be prepared for the fact that they may not get the information they need from the litigant. The litigant simply may not be able to comply. Accepting and acknowledging this reality will contribute far more to courtroom control than protracted arguing.

E. Argumentative or "Unhappy" Litigants

Some litigants demonstrate their illness to the court by being completely incapable of acknowledging help. No matter what the judge does, it will be wrong. Regardless of the amount of help offered, such litigants may insist that they have not been helped at all. They may say things like the following:

1. "You aren't really helping me";
2. "You don't care at all, I'm just a number";
3. "If I don't get help soon . . .";
4. "So you are saying they can do anything they want . . ."; and
5. "So you don't care if my children are safe."

Appropriate and helpful responses include the following:

1. Not Taking It Personally. Judges should not take comments such as these personally. Litigants tend to test judges the same way they test doctors, therapists, and other authorities to see how the authority will respond. These sorts of comments from litigants tend to make the recipient feel bad, like a failure, disrespected, defensive, or some other negative thing that the litigant himself or herself has repeatedly felt. It usually mirrors some experience that they have had in their lives that is beyond the inquiry of the court. The behavior is symptomatic of the illness and not a sign of personal disrespect.

2. Relaxing. When a judge can be aware of this dynamic, it makes a productive response far easier. A relaxed, calm, firm, and nonreactive or nondefensive response from a judge is the best reaction available.

3. Engaging and Listening. The litigant needs to know that the judge is listening and paying attention.

4. Expressing the Desire to Help. Litigants place a great deal of weight on their perceptions about a judge's motives toward them.[76] Judges should expressly show that it is the court's intention to help them and to be of value to them. A judge might say:

    a. "How can I help you today?"
    b. "I want to be helpful to you."
    c. "I'm sorry—I just can't think of anything else to help you."

[76] Tyler, *What Is Procedural Justice?* p. 103.

5. Being Firm. Litigants should not be allowed to escalate into angry or genuinely disrespectful behavior toward the judge or other courtroom staff.

6. Disengaging When Necessary. Do not hesitate to take a recess to stop or redirect unacceptable behavior. Sometimes a brief break is all it takes.

F. The Importance of Disengagement and of Saying "No" Calmly

The ability of a judge to disengage from dysfunctional interactions with litigants cannot be overemphasized.

1. Trusting Oneself. Judges can rely on their own feelings and perceptions to tell them what is happening. If judges find themselves feeling uncomfortable during an exchange with a litigant, it is almost certain that the litigant is also uncomfortable. Something needs to be changed. Judges should make themselves feel as relaxed and comfortable in the courtroom as possible. When the judge feels genuinely comfortable, the chances are better that the litigants will, too.

2. Setting Limits Calmly and Firmly. Litigants do not really benefit from being allowed to go on endlessly, arguing with a judge. Certainly, giving litigants their "voice" in a hearing is central to any justice proceeding. However, when a litigant cannot refrain from repeating him or herself, arguing with or even verbally abusing the judge or opposing party, the judge must put a stop to it. In many cases, the longer that litigants are allowed to continue with this behavior, the more anxious and upset they get.

   Judges actually help litigants by setting limits on unacceptable behavior. By keeping such behavior to a minimum, judges are reducing the chances that it might affect their decision-making process.

   Judges are responsible for maintaining a calm and comfortable process for everyone else in the courtroom. Being able to relax and say "no" to an unhappy or angry litigant without becoming defensive or unkind

demonstrates to the rest of the courtroom that the judge is clearly in control of himself or herself, and of the situation.

Disengagement can be made in various ways, for example:

a. "I'm sorry, but we are simply out of time."
b. "I have to leave enough time for the other people here in the courtroom."
c. "I would like you to talk with the (court staff) person while I move on to the next case."
d. "I am going to take a short recess."

III. Community Resources

Knowledge of available resources in the community and of those working with litigants' mental health issues helps the judge and the court as a whole manage these issues.

1. Resource Guides. Each court should have a guide for judges on what culturally competent and multilingual resources are available in the community to assist litigants with mental health and related issues.

2. Collaborative Courts. In some cases, it may be possible to establish specialized calendars, such as drug treatment court, mental health court, or domestic violence court, during which particular social service providers can be present to assist litigants in the courtroom.

3. Lack of Community Resources. If courts are located in communities without many legal service or social service resources, it is a good idea to locate the nearest place where services are available. Partnerships, supported by computer, telephone, and video-conference technology, may be able to help.

IV. Strategies for Coping With Difficult Cases

A. Keeping Perspective

One way that judges can become vulnerable to added stress is by losing perspective on the degree of power they actually have to help a litigant with mental health issues. If judges expect too much from themselves or from their roles as judges, or if they accept unrealistic expectations placed on them by the litigants, the result is increased stress and lower job satisfaction. While it is understandable that one would feel unhappy about matters such as those listed below, judges should not hold themselves responsible for fixing them. Feelings of guilt and frustration at not being able to change things over which they have no control can become a problem for judges if not recognized. It is useful to remember the following:

1. Judges will not always be able to be helpful to litigants.
2. Judges will not always be able to make litigants believe that the court cares about them, even when it does.
3. Judges cannot make up for the lack of mental health treatment services available in the community, but may provide impetus to further address the need. Seek help from the Judges' Leadership Initiative, a group of judges interested in mental health issues (http://consensusproject.org/JLI/).
4. Judges cannot make up for the lack of legal assistance services available in the community.
5. Often there may simply not be a good solution available to a judge.

B. Avoiding Isolation

Isolation is a commonly cited factor in research on judicial stress.[77] Working with others in the courtroom is helpful in relieving courtroom isolation. Naturally, rigorous care must be paid to the constitutional safeguards for the litigants and protocols developed so as to avoid such things as ex parte communications. Self-help programs can place attorneys and other legal assistance staff in courtrooms to assist with

[77] T. Ells and R. Showalter, "Work Related Stress in American Judges" (1994) 22(1) *Bulletin of American Academy of Psychiatry and the Law* 71–83.

procedural information, help parties reach settlements, and write up the court's orders. Having self-help staff in the courtroom to whom litigants can be referred works to relieve some of the isolation of judging. In the collaborative court models, often there are social service providers in the courtroom to whom litigants can be referred. This also helps relieve isolation. Studies have found that judges who are involved in community work outside the court report higher levels of job satisfaction.[78] Judges should try to participate in community activities, join professional work groups and committees, and communicate with family and friends.

Conclusion

While mental health issues do indeed increase the challenge of serving the self-represented, both judges and court staff, when properly prepared and supported, can move toward resolving any legal issues and assisting in getting such litigants the help they need.

[78] P. Fulton Hora and D. J. Chase, "Judicial Satisfaction When Judging in a Therapeutic Key" (2003–2004) 7(1) *Contemporary Issues in Law*. p. 19; J. P. Ryan, A. Ashman, B. Sales, and S. Shane-DuBow, *American Trial Judges* (New York: Free Press, 1980).

CHAPTER 12: JUDICIAL LEADERSHIP IN ACCESS TO JUSTICE

12

Judicial Leadership in Access to Justice

Introduction

In the end, it is simple: judicial leadership is indispensable.

Court systems are highly complicated organizations, perhaps appropriately not conducive to rapid transformative change. Judges are often the only players with the credibility, reputation, and leverage to build the momentum needed to increase access for the self-represented—and indeed for all people.

This chapter explains that it is appropriate for judges to play this role, both within the court and in the community beyond, explores some of the ways that judges have exercised this leadership, and emphasizes the importance of making sure that such leadership is part of a comprehensive strategy for access to justice, not just for the self-represented but for all.

I. Judicial Leadership and the Judicial Role

Some judges fear that engagement in the overall functioning of the justice system—particularly when it involves leadership in building and inspiring partnerships with the bar, legal aid, and community organizations—is inconsistent with judicial neutrality and therefore with their role.

However, this role is critical to expand services and resources that will allow the system to work effectively and to build resources so that cases involving self-represented litigants can truly be decided on the law and facts of the case.

As section 39 of the 2006 California Rules of Court, titled *The Role of the Judiciary,* puts it:

> Judicial participation in community outreach activities should be considered an official judicial function to promote public understanding of and confidence in the administration of justice. This function should be performed in a manner consistent with the California Code of Judicial Ethics. The judiciary is encouraged to:
>
> **(a)** Provide active leadership within the community in identifying and resolving issues of access to justice within the court system;
>
> **(b)** Develop local education programs for the public designed to increase public understanding of the court system;
>
> **(c)** Create local mechanisms for obtaining information from the public about how the court system may be more responsive to the public's needs;
>
> **(d)** Serve as guest speakers, during or after normal court hours, to address local civic, educational, business, and charitable groups that have an interest in understanding the court system but do not espouse a particular political agenda with which it would be inappropriate for a judicial officer to be associated; and
>
> **(e)** Take an active part in the life of the community where the participation of the judiciary will serve to increase public understanding and promote public confidence in the integrity of the court system.

The reference to the California Code of Judicial Ethics underlines the consistency between the code and such leadership and educational activities. It also highlights the importance of being aware of the demands of the code, by, for example, being careful not to give any impression that the court is on one "side" or the other, or would show favoritism to any parties, or that judges have "pre-judged" persons or issues that may become before the court..

When the judge explains his or her role in any community or court leadership activity, it reinforces the public's understanding both of the court's commitment to access and neutrality and of the importance of that commitment.

II. Sensitivity to the Value and Potential of the Roles of Others

Whenever judges walk into the room, they bring an inherent credibility possessed by almost no other professional. That credibility comes in part from a presumed intellectual and moral capacity validated by their appointment or election, and in part from an awareness of their broad experience in making decisions in complex and important matters. But it may come more than anything from the understanding of the judge's role as neutral—the belief that what the judge is saying and doing is not driven by any self-interest or bias but by a considered understanding of what the public interest requires.

Therefore those judicial leadership activities that make use of this unique credibility are both most likely to be successful and most valuable, in that through such activities judges can achieve changes that no one else may be able to bring about.

Such activities are likely to include the following roles.

A. Building a Consensus Within a Court for Access Innovations

The unique credibility of a judge can help the staff and the court's leadership focus on the ultimate purpose of the court as an institution, as well as encouraging flexibility and creativity in support of those innovations that will better serve that ultimate access purpose.

Matters such as budget, job descriptions, departmental responsibilities, and inertia are less likely to provide insurmountable barriers to change when judges promote the need for change or a particular innovation.

B. Building and Reinforcing Staff Support for Such Innovations

Innovations that increase access to justice frequently have the effect of asking court staff and community service providers to do more than is typically in their job description. While such staff receive gratification

from helping people, and from the positive response that most litigants show to those who are genuinely trying to help, recognition by the judge for their efforts is also tremendously helpful. Some judges consider giving awards, holding a reception, or just saying thanks.

C. Working With the Bar to Build Joint-Access Innovations

Occasional rhetoric notwithstanding, lawyers deeply respect judges and generally do look to judges for guidance on the direction of the legal system. Judges are therefore ideally positioned to help both bar organizations and individual lawyers expand their views concerning the need for all persons to be able to access the justice system, to think more broadly about their obligations as part of a profession committed to the public interest, and to assess whether the bar might benefit from new forms of attorney-client relationships such as limited scope representation.

D. Developing Programs That Engage Judges in Access Innovations

It is a truism: judges listen to judges.

Judges are therefore indispensable in creating, marketing, and shaping any programs that seek to assist judges in ensuring effective access to the courts for self-represented litigants.

A wide variety of educational programs, seminars, writing, and discussion about issues regarding self-represented litigants is necessary to deepen the judiciary's collective understanding of courtroom dynamics before the system is truly as effective as it can be. Judges must lead these activities.

Moreover, the promotion of the judicial role in the kinds of leadership activities described in this chapter is primarily a role for judges.

E. Encouraging and Supporting Community Initiatives That Facilitate Access

In the community, the judge brings a similar unique credibility and can help convince community leadership of the court's integrity and its interest in access.

F. Envisioning the Potential of Access to Justice for All

More broadly, when judges speak about the importance of access to justice, their perspective can resonate with a wide variety of stakeholders.

IV. Supporting Many Kinds of Innovation

It is not surprising, therefore, that many judges find it rewarding and effective to deploy their skills and credibility in support of the following solutions.

A. Self-Help Services

Self-help services remain the gateway to the courts and a major guarantor of the smoothness of the court's entire operations.

Judicial credibility plays a major role in making sure that self-help services are available throughout the court process and are properly staffed and supervised by qualified attorneys. Judges can ensure that self-help services are seen as part of the court's core infrastructure, are integrated into the court's senior management structure, and that the court's systems of evaluation and self-assessment include services for the self-represented.

B. Simpler Procedures

System simplification is a major challenge. Over the years processes have acquired their own logic, their own constituencies, and their own rationalizations. Often they are widely believed to be mandated by external forces such as the legislature or the constitution, and thus not subject to any reassessment. The result is often that processes that are highly complicated and wasteful, and that result in sometimes insurmountable barriers to access for the self-represented, are considered "off the table" for discussion and revision.

Because judges are the experts on the primary sources of perceived external mandate, and because they are the most respected sources of authority in the court system, they are the logical ones to launch the review and reform of these processes.

Such processes include paper flow, clerk and case management processes, calendaring, and forms (to the extent that they are developed locally).

C. Pro Bono and Limited Scope Representation Programs

Clearly, not all litigants are able to represent themselves, and pro bono and limited scope or unbundling programs are crucial to meet the needs of persons requiring more than self-help assistance. These programs depend on bar participation, and both the extent and style of participation are very much a matter of local culture.

Judges are the effective heads of local legal culture and should seek ways to send signals that help transform that culture. They can, for example, make sure that the calendar does not needlessly burden pro bono attorneys or attorneys that provide limited scope services; they can make sure that limited scope attorneys are eligible for fee-shifting payments; they can respect the limits of limited scope representation agreements; they can add a personal note of thanks to a pro bono attorney and encourage public recognition.

D. Community-Focused Court Planning

The judge's participation in community-based court planning sends the strongest possible signal of the court's sincerity in its desire to listen to the community's agenda. Hearing from the community provides critical information to the court as it seeks to appropriately serve all members of the community—including self-represented litigants.

Such participation can also be educational for the community. The judge's clear voice in explaining the court's philosophy can do much to legitimate the court's overall approach and insulate it against the short-term attacks that unpopular rulings can trigger.

E. Meetings on Self-Represented Litigants

As courts focus on self-represented litigant issues, and as they seek to understand better what goes wrong for such litigants and how it might be fixed, the judge's participation brings a critical perspective lacking in other court participants. The perspective of the problems the judge

may experience are needed to craft overall changes, and the judge's presence signals the importance of the issue and the priority that should be placed on it.

F. Speeches to Community Groups

General educational programs, while not necessarily leading to specific innovations, convey a clear message to the community about how the court works and about general legal issues while exposing the judge to community dynamics and perspectives. Business leaders will want to know about small claims and other consumer matters as well as services to which they can refer employees with legal concerns. Law enforcement officers will appreciate the court understanding challenges they face routinely as well as efforts to write orders that are easier to enforce.

G. Reforms of Internal Courtroom Procedures

In the courtroom the judge is supreme. Courtroom innovations, whether in the way judges themselves manage hearings and the receipt of evidence, or through new courtroom services for litigants such as those that help prepare written orders or provide day-of-hearing unbundled assistance, depend on judicial support and energy. They often have the added advantage of making the judge's job easier.

H. Community Resources for Litigants

Judges also report that they have been able to expand resources available to the litigants in front of them by:

1. Convening meetings with social services providers (preferably with food). People come when the judge calls the meeting.
2. Talking about the problems that the litigants face and why it would be helpful to have social services programs in the courtroom or to have easy referrals to services.
3. Asking the social services agencies what their needs are and how the court can help them to provide services.
4. Thanking them for their efforts.

V. Access for the Self-Represented as Part of an Overall Access Strategy

Each step that a judge takes in support of access for the self-represented becomes part of the long-term collective agenda of the court system as a whole.

In the long term, judges are generally most effective when they see these steps as part of an overall strategy, not just for the self-represented, but for all those in need of access to justice.

Again and again, an innovation targeted initially at the self-represented, whether standardizing forms and processes, creating additional courthouse assistance resources, redesigning caseflow management, or changing the way the judge conducts hearings, comes to be seen as assisting all.

The forms reduce costs by speeding legal work and facilitating unbundling; the courthouse assistance programs serve lawyers, too, as well as speeding courtroom procedures and reducing delay and adjournments; changes in the conduct of hearings reduce frustration and increase trust and confidence.

Thus a strategic view that always looks at the system as a whole provides the best chance for change, the greatest chance for the most effective change, and the greatest hope for broad stakeholder participation.

Conclusion

The role of the judge is crucial.

An inspired, inspiring, and engaged judge can help lead changes in our system that will improve the access to justice, and thus the lives and the belief in our democratic institutions, of millions.

Appendix

Additional materials are available at
www.courtinfo.ca.gov/programs/equalaccess

Appendix

Sample Script
Traffic Arraignment Calendar

Ladies and gentlemen:

This is the traffic arraignment calendar. This is the time when you will be informed of the charges that have been filed against you on the citations you received. At this arraignment, you may plead guilty, not guilty, or no contest. For those persons charged with misdemeanors, you have the right to counsel, the right to have time to seek counsel, and if you cannot afford private counsel, I will give you the opportunity to interview with the Public Defender to determine whether you are financially eligible for their services. I will ask you if you want time to seek counsel when I advise you of the charges against you.

If you are charged with an infraction and you plead not guilty, your case will be set for a court trial at some future date, and the court will subpoena the officer to be present. Unless you tell me that you do not waive time for trial, I will assume you do waive time for trial. At that trial you will be able to confront the officer, and the officer will be required to prove the case against you beyond reasonable doubt. I cannot find you not guilty today no matter what explanation you may have. I can only make a finding of not guilty after there has been a trial at which the court has heard both sides of the case.

If you plead guilty or no contest, I will assume that you waive time for sentencing unless you tell me that you do not waive time for sentencing.

If you are charged with an equipment violation or a registration violation, it is not a defense that the car was not yours at the time you received the ticket, because when you drive a vehicle in California, it is your responsibility to make sure that it meets all the requirements of the California Vehicle Code. If you are charged with a failure to appear, it is not a defense that you didn't receive a courtesy notice, because when you sign the ticket, you promise to come to court within the time written on the bottom of the ticket.

For those persons who wish to attend traffic school, the fee charged by the court to administer this is $_____. This is in addition to any fee that is imposed in lieu of a fine. You are eligible for traffic school if you

have not attended school for a violation that occurred within 18 months of the current violation. You must request traffic school at the time of sentencing. If you fail to request it, then you will have to come back to court on another date.

Finally, if you are going to show me proof that you now have a driver's license, registration, insurance or that you have an equipment violation signed off, please have that proof with you in your hand at the time you come to the podium, and not in your wallet, purse, or pocket. In that way we can move the calendar along more quickly for everyone.

Sample Script
Traffic Court Trials

Good morning, ladies and gentlemen.

This is the time and place for traffic court trials. Before we begin the trials, I will explain briefly the procedure I will follow in hearing these matters.

We will be hearing cases one at a time. As I call your case, I ask that you come forward. The officer will take the table that is to my right (closest to the jury) and the defendant will take the table to my left. As the state has the burden of proof, I will ask the officer some preliminary questions about the citation that was issued, then ask the officer to tell me what caused him or her to issue the citation. Once the officer has completed his or her testimony, I will provide the defendant with the opportunity to cross-examine the officer, which is that portion of the trial that allows the defendant to ask questions of the officer about the testimony that has been given. That is not the time to present any testimony on your own behalf. That will be provided at a later time. If you wish to ask questions of the officer, I do ask that you attempt to phrase each question in the form of a question, that you ask the questions one at a time, and that you allow the officer to answer each question. These proceedings are being recorded, and to have an appropriate record, only one person can be speaking at a time.

After that is complete, I will give the defendant the opportunity to present any evidence on his or her behalf and to give any testimony if he or she decides to do so, keeping in mind that a defendant is not required to present any evidence and cannot be forced to testify, as the defendant does have the right to remain silent.

During your testimony, you may offer any photographic or documentary evidence you may have, which I will examine and take into full consideration. You also have the right to make a brief closing argument in defense of your position whether or not you have testified. When all the evidence is before me for decision, I will give you my ruling.

Call the matter of People v. _____.

Officer, will you please identify yourself for the record.

On [date of alleged offense] at approximately [time of the alleged offense] did you issue a citation to [name of defendant] alleging a violation of [nature of offense]?

Please tell me what you observed that led you to issue this citation.

Sample Script
Short Advisement

You have the right to be represented by an attorney. If you wish to postpone this arraignment so that you can have an attorney present, let me know at this time, and we will postpone your case for arraignment and plea.

All matters before this court are infractions or are treated as a matter of law as an infraction. If you wish to have your case treated as a misdemeanor, let me know at this time. The primary difference between an infraction and a misdemeanor is that you are not entitled to a jury trial or court-appointed counsel if your case is treated as an infraction. However, if you plead guilty or are found guilty of an infraction, the only possible punishment is a fine. People who are guilty of misdemeanors face the possibility of time in jail.

If you plead not guilty, the matter will be set for a court trial within 45 days.

If you plead guilty, you are giving up the following rights:

A court trial.

The right to see, hear, and cross-examine the witnesses against you.

The right to have the court order witnesses on your behalf to be present and to bring physical evidence to the courtroom.

The right to not incriminate yourself, which means you can't be forced to plead guilty and if you choose to have a trial and decide not to testify, your decision not to testify can't be used against you. If you plead guilty, you will be agreeing that you committed the infraction and thus will be incriminating yourself.

Courtroom Referral to Family Law Facilitator

Date: _____Department: _____

Party's Name: _____
Case No.: _____

☐ Preparation of Order After Hearing
☐ Financial Mediation
☐ Review File for:

_____
_____

Explanation of:

_____
_____
_____
_____
_____

To Make an Appointment for:

☐ Assistance With Judgment
☐ Assistance With Settlement Conference Statement

Outside Referrals for:

☐ Preparation of QDRO
☐ Domestic Violence Assistance
☐ Guardianship Assistance
☐ Attorney Referrals

Additional Information/Assistance With:

☐ Custody/Visitation
☐ Spousal Support
☐ Child Support
☐ Other:

_____
_____

Sample Script
Family Law and Domestic Violence Calendar

Good morning. For many of you this is your first appearance in court, so I am going to briefly explain the court's procedures.

I will first read through the calendar. As I call your name, please let me know if you are here. If the other side is not here—please let me know so I can take your case as one of my first cases.

If you have been unable to serve the other side, please let me know when I call your name. I will give you another court date, and you can try to get that person served for the next court date. You will need to complete a form called Re-issuance of Order to Show Cause. If you need help with that, there are volunteers here today who can help you with the paperwork.

Finally, if you have an agreement on all of the issues, let me know because I will then move your case to the top of the list.

Whether there is one side here or both sides, after I hear your case I will make an order. You will need to write up that order in a written order after hearing. For those of you who are representing yourself, that can be difficult to do. I know it can be hard remembering everything that is ordered. So, we do have some volunteers here today who can write up the order after hearing. If you would like their help, let me know when I hear your case, and they will meet with you in the hallway after your case is over. They are not attorneys, so they cannot give you legal advice. They are members of the community who are volunteering their time to help people prepare their orders.

When your case is called, please come forward and take a seat at the table. The person who filed the motion should sit here [point to seat] and the other side should sit here [point to seat]. As you can see, we have a lot of cases this morning, so I will need to move pretty quickly so that everyone can get heard today. When I hear your case, I will ask you if the statements in your declarations are true and correct. I will also ask you if you still want the orders you asked for in your motion. If both sides are here today, I will hear first from the person who filed the motion and then I will hear from the other side. I will hear from both sides before I make my decision, but I cannot hear from both sides at the same time.

If you have documents such as pay stubs, declarations, pictures, or any evidence you want me to consider today, you must provide a copy to the other side. Anything I see, everyone gets to see. So if you have any such documents, please make sure the other side has had a chance to review them before I call your case.

If Attorney Volunteers Appear for Voluntary Mediation

I also have two attorney volunteers who are here today to mediate property disputes or other issues such as support. If both sides of the case are here today and you have issues such as dividing property, determining who should move out of the house, dividing bills, determining support, and so forth, and you would like to meet with one of the attorney volunteers, let me know. They cannot represent either side, but they are very knowledgeable about how these cases are generally decided, and they can help you reach an agreement. It is not mandatory to mediate, but sometimes you can resolve more issues than I can in the ten minutes or so that I have today to hear each case. If you reach an agreement, the attorney volunteer will write it up for you. If you can't reach an agreement, you can come back to court, and I will hear your case. So when I call your case, if you think you would like to try mediation, let me know.

Dispose of All Defaults, Continuances, and Agreements

For those of you who are here today on issues of support, I will need certain information to calculate the correct amount of support. If you have not filed an Income and Expense Declaration, please take the time now to complete the form. My bailiff can give you one of the forms.

For those of you who are here today on custody issues and visitation regarding your children, I need to explain how we handle these cases. If you are unable to agree on these issues, the court does require that the parents attend mediation. You will first attend a mediation orientation program that is held on the first and third Tuesday of the month. At the orientation program you will get an opportunity to meet our mediators. They will discuss with you the many different kinds of custodial arrangements and what kinds of things work best for children of different ages. What may work for a child of fourteen is not necessarily going to be the best plan for a one-year-old. After the orientation program, you will be assigned to

an individual mediator who can arrange to spend a couple of hours with you and assist you to reach an agreement. With the help of the mediator, most people are able to reach an agreement that is in the best interest of their children. If you are unable to reach an agreement, the mediator will make a recommendation that will be sent to me. The mediation process normally takes about three to four weeks. So, when I hear your case today, I will not be making a permanent order. I will just be making a temporary order for the next three to four weeks. I would ask that you be thinking about what you can live with for the next three to four weeks while you are going through the mediation process. I am sure that with the assistance of the mediator you will be able to come up with a better plan for your children than the court can in the ten minutes I have to hear your case today.

Courtroom Protocol

- Following are guidelines on how cases will be handled. I may vary from these guidelines as needed.
- The goal is for both sides to have a full opportunity to present their case.
- The Deputy has explained how he expects everyone to behave. I want everyone to be treated with dignity and respect.

The court reporter takes down everything that is said.

- In order to ensure an accurate court record, only one person can talk at a time.
- If interrupted, please stop talking so that I can say something.
- Unless I say otherwise, the person who brought this matter to court presents first. That person is the moving party.

The moving party has the burden of proving their case.

- Proving their case means that after all evidence is presented to the court, the evidence, on balance, weighs in favor of the moving party.
- If the evidence weighs in favor of the other party, or if the balance is equal, the moving party has not met their burden and will not get what they are asking for.

If I interrupt you while you are speaking ...

- It is likely because I have heard enough on that point, or I believe that what you are talking about is not legally relevant.
- If I interrupt, I will ask you to move on.
- I might even ask questions.
- Because of the size of our OSC calendar, I will allow each side five minutes to present your case, including rebuttal.

I will rule on evidence, not on other comments you make

- Evidence includes testimony, exhibits, documents, declarations, and the like.
- Each party will have an opportunity to present its evidence.
- Please confine your comments to evidence in the record – i.e., evidence the other side has had a chance to review and respond to.

I will not consider evidence the other side has not seen.

- If you have any evidence that you want the court to consider, but you are not certain that the other side has seen it, you must provide a copy to the other side at the end of these remarks, or I will not consider the evidence.
- If the other side objects that you are "assuming facts not in evidence" (i.e., commenting on things outside of the documents served and filed), I will likely sustain that objection.

Present objections succinctly.

- If you have a legal objection to what the other side is presenting, you are to state your objection briefly.
- If I sustain the objection, the evidence will not be considered; if I overrule it, I then want to hear the evidence.
- The time consumed in dealing with objections will be charged against the objecting party.

The court will only rule on the issues properly before it.

- The issues before the court are the issues listed on the moving papers.
- It is not fair for me to allow the other side to bring up issues you have not had an opportunity to respond to.
- Likewise, it is not fair for me to allow you to raise issues the other side has not had an opportunity to respond to.

When you've had your turn to speak, it's your turn to listen.

- Once both sides have presented their evidence, I require both parties to remain silent so that I can make a decision.
- When I make a decision I ask that both parties not argue with me or with one another.

I may ask you to prepare an Order After Hearing.

- This is an official court document.
- You may obtain assistance with this by going to the Family Law Assistance Center, the self-help center on the first floor, the law library, or by obtaining proper legal assistance.

Cases will be called in a certain order.

- Sometimes the law requires them to be called in a certain order, and other times there is a need to call a case first because of a priority.
- The courtroom assistant to my left determines the order in which the cases are called based on certain legal requirements.

As I call the cases on the calendar ...

- I need each side to announce whether or not you are ready and how many minutes you anticipate to present your side of the case. Be accurate on your time estimate, because I will hold you to it.
- On civil harassment and domestic violence cases, please tell me how many witnesses you plan to call, if any. Ex Partes, OSCs, and Noticed Motions are heard on declaration.
- If the total estimate is over 10 minutes, I will recall it at the end of the calendar, after dealing with the less time-consuming matters.

EVICTION

Your Trial Day

Prepared by:
Neighborhood Legal Services
1 (800) 433-6251

Los Angeles County
NEIGHBORHOOD
Legal Services

Eviction Process Step 1 - THE Day of TRIAL

How Should I Dress?

You should wear clothes that you would wear to attend church (dress conservatively). If you have tattooes, you should try to cover them up.

What Should I Bring to my Trial?

- **Pictures** of the defects in your apartment;
- **Certified copies** of any health department reports;
- Copies of any **letters** that you had given to the landlord/manager [for example, letters you sent asking for repairs];
- **All your rent receipts or proof of payment** of rent [for example, money order stubs];
- **Witnesses**. A letter from a neighbor is not acceptable. The person must come to your trial to talk with the judge.

If I Do Not Have My Proof on the Day of My Trial, Can I Get a Continuance? NO!!! The judge will NOT delay your trial because you don't have all your documents or witnesses. You must bring any proof you have to your trial.

What Should I Do After I Go Inside the Courtroom?

1. Right away go to the person in uniform ("bailiff") and tell her/him your name then sit down anywhere in the courtroom.
2. The judge will call your name to see if you are in the courtroom. When you hear the judge call your name, stand up, state your first and last name and that you are the "tenant."
3. The judge will ask you if you have talked with the landlord about the case or tried to "settle" the case to avoid going to trial. If you have not talked with the landlord, the judge will tell you and the landlord to go out in the hallway to talk about making a deal ("settling the case").

Should You Settle (make a deal)?

YOU HAVE TO SPEAK UP and ask for what you want. The landlord will not make offers. The worst that could happen is that he says no.

For example:

- If you did not pay rent because your apartment was in bad condition and the landlord did not fix the problems, you should try to make a deal with the landlord. Ask the landlord to agree not to make you pay the rent that you owe and ask for extra time to move. Or, ask the landlord to let you pay less rent until repairs are made, then pay what you usually pay.
- If you want to stay, you should tell the landlord or the landlord's attorney that you want to stay.
- If you want to move out, you should ask the landlord to agree that you do not have to pay the rent money you owe or the costs and attorney's fees. Sometimes landlords only want to get the apartment back and will agree to give up the rent you owe if you move out.

You can settle if you feel that what the landlord is offering you is just and fair.

- **If you do not agree** with what the landlord is offering, tell the landlord or his attorney that you want to go trial.
- **But remember,** the judge can only decide legal issues. If you do not have proof to support your defenses, you will probably lose your case. **For example**, if you do not have a rent receipt to prove that you have already paid the rent, telling the judge that you paid may not be enough because the judge has to decide who to believe – you or the landlord.

Eviction Process Step 1 (continued): The Trial Begins – What Happens?

1. The Plaintiff (landlord) Goes First

- The plaintiff (landlord) will call witnesses to prove why you should be evicted.
- After the plaintiff asks his/her witness questions, you also can ask the witness questions. **BUT,** this is **not** the time to tell your side of the story and it is **not** the time to tell the judge that the landlord is lying. You have to wait your turn to tell your side.
- **NOTE:** Even if the landlord or the landlord's witness says something to the judge that is not true, do not react. For example, do not start shaking your head, make any noises, make faces or roll your eyes. The judge **will** see you.

2. Then the Defendant (you, the tenant) Presents His or Her Case

- Tell your side of the story to the judge like you are telling the story Get right to the point.
- Offer to show the judge all of the documents, photographs or other evidence you brought with you to court.
- You can ask your witnesses questions. Have the questions written down so you won't forget anything.
- After you have finished with your questions, the landlord or the landlord's attorney will ask your witnesses questions.

Eviction Process Step 1 (continued): The Trial Begins – Examples of How To Show the Judge Your Evidence

If you did not pay the rent because the landlord would not fix the problems in your apartment …

A. You say: "I did not pay the rent because of the bad conditions and the landlord would not make repairs."

B. Then show the judge your pictures. Show the judge one picture at a time and tell the judge the following information about **each** picture:

1. **Who** took the picture and **when** was the picture taken.
2. **What** is the defect that is shown in the picture. Tell the judge exactly what it is. **For example,** say that when you turn on the water, the water leaks underneath the sink and that you have to catch the water in a bucket.
3. **How long has the defect existed.** Be specific. Do not just tell the judge that it's been a problem since you have moved in. Unless you have health reports or other proof from the date that you moved in the judge might not believe you.
4. **When did you tell the manager/landlord about the defect.** How often did you complain about the problem. If you tell the judge, "every day", the judge may not believe you. But maybe you had told the manager the last two months when you paid your rent;
5. **Did the landlord repair the defect.** For example, did the landlord/manager promise to repair the defect, but then never did.
6. **If you or your family or friends did not cause the problem, tell the judge.** For example, if there are cockroaches, you should tell the judge that you do not leave food out, you wash the dishes on a regular basis.
7. If it is true, you should tell the judge that you and your family did NOT refuse a worker access to your apartment to make repairs;
8. **Tell the judge how the defect affects you and your family.** Like when the sink leaks you cannot wash the dishes or that cockroaches will spread disease.

C. Then show the judge your other proof - the health reports and or any letter(s) that you had given to the manager about the necessary repairs.

D. You can have witnesses, but they can only tell the judge things that are related to why you are being evicted AND you must have questions to ask your witness – the judge will not ask the questions for you.

After you have finished with your questions, the landlord or the landlord's attorney can ask you or your witnesses questions.

ANOTHER EXAMPLE:

If the landlord is evicting you because he gave you a three day notice on the 3rd of the month, you tried to pay on the 8th of the month when you usually pay the rent.

A. You say: "I usually pay my rent on the 8th of the month and the landlord accepts it."

B. Show the judge all of your rent receipts that prove that you have always or usually paid your rent on the 8th of the month and not on the 1st of the month.

The judge may let you make a final statement at the end.

- In your statement you should tell the judge why you should win – again only legal issues. The judge cannot make a decision based on the fact that you have a family and have no place to go.

Step 2 – The Court's Decision

The judge will usually give his or her decision while you are still in court. If not, you will be notified by mail, usually within a few days after the trial.

The court's written decision will include four things:

1. A statement that will say you are allowed to stay (you win) or the plaintiff wins (you lose);
2. Whether or not you have to pay back rent;
3. Whether the side who wins can get money from the losing side for money filing or other court fees. (If you win and want the other side to pay your costs, you must file a form with the court within 10 days after trial);
4. Whether the losing side has to pay for the winning side's attorney's fees. (if there is a written agreement allowing such fees and the winning party hired an attorney).

Read the decision carefully.

If you do not understand what it says, ask someone to explain it to you.

If You Win At Trial – you do not have to move out but you will have to pay the rent you owe.

- Even if you don't have to move, sometimes the judge will order you to pay the back rent and that it be paid within 5 days. If it is not paid, the judgment will be reversed meaning your landlord wins and you will have to move out.
- If the judge does not make you pay the back rent, the landlord will probably serve you with a notice to pay rent or quit. If you do not pay the rent or move out, your landlord may start the eviction procedure over again.

If You Lose At Trial – you have to move out –
See Step three: What Happens If You Lose Your Case

Eviction Process Step 3: What Happens If You Lose Your Case

If the judge tells you in the courtroom that you lose:

- **<u>Right away</u> ask the judge for more time to move if you need more than one week.**
  You say: "With all do respect, your honor, I request 30 days to move."
  - Make sure you can explain why you need more time. You might have to pay for the extra time.
  - If the judge does not give you more time, **YOU DO NOT HAVE TO MOVE OUT THAT SAME DAY AS YOUR TRIAL.**

Final Notice - Notice to Vacate

The **Notice to Vacate** is a paper that says you have five days to move out. The sheriff will tape a copy of the notice to your door that tells you when you have to move out before the sheriff comes to get you out.

You won't get a Notice until <u>after</u> you lose your case. You lose when:

(1) You lose at trial;
(2) You do not show up at trial;
(3) The court orders you to pay the landlord a certain amount of money so that you can stay and you don't pay; or
(4) You do not file an answer to the Summons and Complaint.

If you wait until the last minute to move, the sheriff will not give you time to pack your things. He will give you a couple of minutes to get out. It does not matter if you have children or are disabled or sick. You will have to get out immediately.

Eviction Process Step 3 (continued):
How do I get my personal possessions back if I did not have time to get them out before the sheriff locks me out?

First, You must write a note to the manager (make sure you put the date on the note and keep a copy for yourself) and give it to the manager the day after the sheriff comes.

The note should say this…

(Date)

Dear Manager/Landlord:
I was not able to take all of my things with me before I had to move out. Please do not throw any of my things away. I will contact you soon to set a time to get my things.

Thank you,

_____
(your name)

Second, You might have to pay the landlord a fee for storing your things until you can get them.

Third, If you do not give a note to the manager, the manager can claim that he did not know that you were coming back for your things and throw your things away.

1) Write a letter of the alphabet below and say to the judge:

Your honor, my photograph marked as ____ is a photo of:

2) Write **BELOW** who took THIS picture and when was this picture taken.

Who took THIS Photo:

What date was THIS photo taken:

_____20__

3) Write **BELOW** when you complained to the manager or owner about the bad condition in **THIS** photo:

Date:

1. **_____20__**
2. **_____20__**
3. **_____20__**
4. **_____20__**

4) Write how the bad condition shown in **THIS** photograph affects you and your family:

1. **_____**
2. **_____**
3. **_____**
4. **_____**
5. **_____**

READINESS CALENDAR CASE PREP

Case #_____Parties: _____
Dependency Case #_____ ___Open ___Closed Department_____
Self-Represented Litigant Calendar Eligible: _____

Current Mediator_____ __ First Tier __ Second Tier
Last Mediation Date: _____ Previous Mediators:_____

Exempt from Orientation?: Petitioner:_____ Reason:_____
Exempt from Orientation?: Respondent:_____ Reason:_____
Primary Language: Petitioner:_____ Respondent:_____

Child(ren) reside with: ___Petitioner ___Respondent County of:_____

Restraining Order/Expiration Date/Restrained Party:_____

The matter is on calendar for: Filed by:_____

- ❑ Notice of Motion / Order to Show Cause re: __Modification of:
  - ❑ Custody & Visitation
  - ❑ Child Support
  - ❑ Attorney Fees & Costs
  - ❑ Spousal Support
  - ❑ Other_____

Documents related to hearing:

- ❑ Notice of Motion
- ❑ Order to Show Cause
- ❑ Proof of Service filed on:_____
- ❑ Responsive Declaration to Notice of Motion or Order to Show Cause
- ❑ Declaration of:_____
- ❑ Income & Expense Declaration
  - ❑ with / without check stubs
- ❑ Other:_____

- ❑ Judicial Notes:_____